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Supreme Court, U.S.
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No. 10-280

IN THE

SUPREME COURT OF THE UNITED STATES

NIKROUZ GHAZIBAYAT

PETITIONER

VS.

SBC COMMUNICATIONS, INC, SBC ADVANCE SOLUTIONS, INC.; ASI.

RESPONDENT

ON THE PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS.; APPEAL FROM THE DECISION OF THE STATE OF CALIFORNIA APPELLATE COURT SECOND DISTRICT DIVISION TWO.

PETITION FOR THE WRIT OF CERTIORARI

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In Proper.

QUESTIONS PRESENTED

1) Whether in an intentional Tort Case State appellate courts can substitute its own judgment for that of a jury and trial judge without ordering a new trial.

2. Whether it was an error to prevent jury of seeing an internal memo, "exhibit 105" an evidentiary document, that proved defendant's culpability.

3. Whether petitioner Boyd's contract with the Avrora movie studio stipulated for $2.7 million was excessive.
Whether it is in province of a State appellate court to decide about the stipulation of a contract between private parties.

4. Whether it was an error to apply contributory negligence in plaintiff Boyd's case.

5. Whether two parties stipulated contract should be decided by the appellate court rather than by the parties involved.

6. The ninth circuit federal court of appeal denied judicial review, basing its decision on Rooker Feldman doctrine. The court noted, under Rooker Feldman doctrine, it lacks subject matter jurisdiction

1) Petitioner's case involved civil rights violation.; whether a doctrine can void the constitution of the United States.

U.S. Constitution, article "3" Common law, safeguarding the 7th Amendment: "In cases

involving civil rights violations federal courts have jurisdiction."
"28 U. S. C §1332" Jurisdiction of Federal Court.

2) Whether ninth circuit had jurisdiction. (Diversity).

Petitioner resides in the State of California. Defendant's Headquarter is in the State of Texas, also doing business in the State of California.

PARTIES IN PROCEEDING

Pursuant to Rule 14.1 (b), the following identifies parties involved.
Petitioner Nikrouz Ghazibayat aka, Nicholas Boyd is and has been a resident of the State of California, County of Los Angeles. Petitioner In pro se.
Pacific Bell; SBC Communications Inc.; SBC Advance solutions Inc.; ASI. Headquarter and, Center of Operations, in San Antonio, Texas. Also doing business in the State of California. Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follow:
Petitioner Nikrouz Ghazibayat aka, Nicholas Boyd,
is a writer, and producer of Historical events.
Petitioner is not incorporated.

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A. Rescinding jury and trial judge's decision without authorizing a new trial conflicts Federal law and various circuits decisions. Judicial procedure, civil rights: State courts decision cannot obviate federally created law. If there is a flaw in any part of a case, a new trial must be authorized. Statutory authority of the '4" Amendment.; (4th Cir September 24 1996) Margery M. Parson v. Lalita Norton.; ["Constitutional law"] 162(1) due process.; Supremacy of Constitution article "3" safe guarding the 7th Amendment.

B. Petitioner Boyd's contract with BG, production, ("Avrora") Element of a contract between to parties is sufficient as a matter of law. (2002) 28 Cal 4th 1059.[124 Cal. Reptr. 2d 142 Dart Industries Inc v. Commercial Union.

C. It was an error to deny defendants signed admission of culpability Exhibit No. "105" to be shown to jury.

D. In a diversity case the federal Courts have jurisdiction. Jurisdiction. 28 U. S. C §1332" (1st Cir. 1978) 220 F. Supp. 490. S.D. N.Y. 1963. 580 F 2d. 655. (3rd Cir. 1968) 397. f. 2d. Fraley v. Chesapeake'.

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Opinion below

The decision of the California State appellate court Second District, Division two is in the Appendix to the petition, ("Pet. Appendix No. 1"). The opinion of the ninth Circuit court of appeal is in the Appendix to the petition, ("pet. Appendix No. 2")

JURISDICTION

California State court of appeals second district division two issued its decision on July 5, 2006, and denied rehearing on July 25, 2006.
Ninth Circuit federal court of appeal issued its opinion on July 5 2008, and denied rehearing September 5, 2008.
This court has jurisdiction under 28 U. S. C. §1254 (1).

Constitutional and statutory provisions.

This case involves provisions of the right for jury trial. Title VII, 42, (M. D. N.3004) 223 F. R. D. federally-- created rights, Due process. In all civil claims involving jurisdiction, that claim should be given scrutiny, merit care. 3.2.7.1.1. Civil rights, title VII, 42 U. S. C. 2000(e) Ct 286. 51L. Ed. 504. 1907.

Statement of case

1. The decision of court of appeals of the State of California second appellate district division two comes in conflict with various circuit courts decisions. Rescinding jury and trial judge's decision without authorizing a new trial is contrary

to the federally created Constitutional law; civil rights title "VII" right for a jury trial.

2. United States ninth circuit court of appeals had jurisdiction of this matter pursuant to-
28 U. S. C. §1331.

FACTUAL BACKGROUND.

An intentional concrete harm was inflicted upon Boyd by defendant "SBC" Petitioner Boyd's lifetime research work was destroyed by defendant. Following a jury trial, jury declared defendant "SBC" Guilty of oppression and fraud with malice and awarded plaintiff Boyd $33,000 punitive damages, and $60,000 compensatory damages. (Plaintiff Boyd's actual damage was $2.7 Million). Plaintiff Boyd appealed in court of appeal of the State of California second appellate district division two on the insufficiency of the amount of punitive and compensatory damage awards. Defendants cross-appealed the punitive damage award only. California State appellate court rescinded punitive damage award in its entirety, and confirmed jury's compensatory damage award, stating that stipulated amount in contract between the movie producer "Avrora" film studio, and plaintiff Boyd was excessive. New trial was not authorized.
Punitive damage.

"Appeal §1634-2.
"The award of the punitive Damages is matter for the jury in the first instance and trial judge Thereafter."

Statement of trial judge on record.

"The evidence supports an inference that ASI technician Kassenborg was repeatedly warned by Boyd about the screenplays on the hard drive and their value, but he nevertheless deliberately erased the screenplays from the hard drive. There was then evidence to support that ASI knew of Kassenborg's memo and attempted to cover up. The jury was instructed on ratification and on "malice. "The malice instruction (C A CI 3944) told the jury that included conduct [that] was despicable and was done with willful and knowing disregard of Rights...of other." The conduct described above, in the court's opinion, falls well Within that definition. (See, e.g., Nippon Credit v. 133 (2002) 86 Cal. app. 4th 486, an action for waste resulting in no injury and involving only economic loss where the defendant's conduct was sufficiently spiteful to warrant exemplary damages."

Internal memo of defendant "SBC" written by the vice president of "SBC" addressed to the president of SBC, as follow:

"Attorney is handling this issue on behalf of Mr. Boyd. One of our employees showed up to install DSL, Spent 8 hours, going through files and wiped out his whole computer. We fired the employee and Mr. Jack Mc Govern sent a letter stating ASI would pay Mr. Bayat any fees he incurred for data recovery. Mr. Bayat is a scriptwriter he needs to recover his scripts that will eventually be worth in excess of "$10 million"

*Petitioner/Plaintiff submitted this documentary evidence, exhibit "105" in pretrial, before the jury selection, and again before jury deliberation."

Lower court proceeding
Petitioner Boyd's former attorney Mr. Stack is asking Superior court judge Mr. Aragon to allow the evidence "105" be admitted.

Mr. Stack, petitioner Boyd's former attorney on record:

"Mr. Stack: Yes your honor. I felt that that is a document that appeared in the defense exhibit notebook. It was exhibit 105, entitled "Executive appeal." And obviously, as a defense exhibit, we felt something that they had initially put in the book and be something that is authenticating. We felt it gives a further completion to the story with regard to the contact that was going on between the parties and SBC after the incident took place, and makes reference to issues about the technician being fired and as to our communication that was going on. And we felt that it just gives a complete story at the time when they otherwise have introduced some of their notes internally with regard to communication that was going on, and we felt it flies in a time-period that is significant in January 2001."

The court: "So exhibit 105 has already been marked for identification as part of the record."

Mr. Stack:
"Thank you your honor."
The court:
"The motion is denied"

Superior court trial judge did not give any explanation as to why he is denying the admission of this crucial evidence.
Petitioner Boyd's economic loss was 2.7 million USD.
jury award just over 2% of Boyd's stipulated contract amount, and award as compensatory damages.

Jury awarded 1% ($33,000) as punitive damages of petitioner Boyd's economic loss.
Had the jury seen evidence "105" they would have realized defendants SBC's perjury and awarded plaintiff Boyd his entire amount of his loss.

Promulgation of Federal rules of procedure.

"If defendant's culpability is proven punitive damage award must be imposed."

Re: Plaintiff Boyd's contract:

The Supreme Court decided that the stipulated contract between two parties should be sufficient as a matter of law.

(1994) State of Oregon v. Sup. (Lilland) 24 CAL. APP. 4th, 1550, 1555, Cal. Rptr. 2d 909.

"An offer was made and essential elements of the contract were communicated, shall be sufficient.

(2002) 28 Cal. 4th 1059. [124 Cal. Rptr. 2d 142.

Dart industries Inc v. Commercial Union Co.
"The Supreme Court reversed the judgment of the court of appeal and noted, that the language in the

document establishing the elements stipulated in the contract between two parties should be sufficient as a matter of law."

(1981) U.S. 910,101 S. O. Ct. 1980.68 L. ED 2d. 299. Dethloff v. zeigler Coal Co.
"Trial court decides as a matter of law whether punitive damages are justified."

Kelsey v. Motorola. 74. I11. 2d, 172,23,I11. Dec. 559,565,384 N.E 2d, 353, 359.
"As a matter of the law, trial court decides whether punitive damage is justified in particular case."

The US Constitution is the supreme law of the land.
Adopted November 1972, "States cannot exercise independently "Supra due process clause of, 14th and 8th Amendments."
"Negligence is prerequisite to recovery of damages, if relief sought involves Contract, and Punitive damages."

This decision of the appellate court sent twenty years of plaintiff Boyd's entire lifetime very arduous research work into the oblivion, and scared-petitioner Boyd for the rest of his life.

Allowing California State appellate court's decision to stand will deprive not only petitioner Boyd, but also every victim of basic civil rights.

Appeal §1634-2.
"[The jury instruction is at the discretion of trial judge.]"

Denial of judicial review in ninth-circuit federal court of appeal:

Ninth circuit court of appeals refused the review, stating that Rooker-Felman doctrine bars federal courts to review State-court's final decision.
A periodic status check on the Internet, the enclosed docketing report revealed that the ninth circuit court of appeals did not have plaintiff's trial transcript...it indicated that the ninth circuit had only plaintiff's bulky brief filed in the Central district court. After 14 months. Review of the docketing report will indicate the above).

Petitioner Boyd, was in possession of the trial transcript. Petitioner Boyd, called the ninth circuit court of appeals, and offered to convey the trial transcript to them. The court told Plaintiff to inquire in the Central federal district court to see if they were in possession of plaintiff's trial transcript; however, the inquiry turned out to be of no resolve.
The central federal district court was not in possession of the transcript.
Again, plaintiff wrote to the ninth circuit and offered them to convey the entire trial transcript; nevertheless, plaintiff did not hear from the ninth circuit court of appeal, until short after the above communiqué, plaintiff received a decision of denial.

"[Citation]" (1987) U.S. 97,108 S. Ct. 404, 98 Led. 2d. 415.
"While diversity due process exists, where the matter in controversy exceeds the sum of value of $75,000.00, exclusive of interest and costs, and parties domiciled in different states."

28 U. S. C §1332 "Federal courts have jurisdiction."

Defendants headquarters and operation of business, is in Huston Texas; also doing business in California. Petitioner is and resided at all relevant times in California. Plaintiff Boyd's economic loss was $2.7 million.

CONTRACT

It was an error rescinding plaintiff's legal contract. Court stated that $2.7 million, stipulated in plaintiff Boyd's contract was excessive. Petitioner must emphasize that this amount was stipulated for three full-feature-length-motion-pictures in entertainment industry standards a modicum amount.

Supreme court and various circuits decided that the language in the document establishing the elements stipulated in the contract between two parties should be sufficient as a matter of law.

Considering Boyd's immense economic loss of $2.7 million, and In light of defendant's assets, of one hundred Billion Dollars USD, Jury's punitive damage award of $33,000, was awful low .
Even this modicum amount was rescinded in its entirety.

INTENTIONAL TORT.

Defendants paid the employee $25,000.00, and fired him. This employee, who intentionally caused harm to petitioner Boyd, worked for defendant SBC only for proximately one year and was still in training. He was in Boyd's office for 8 hours copying and then deleting Boyd's three screenplays. See exhibit No. "19" computer data recovery center report.

Disposition:
Cross examination of Mr Atterbury, the president of defendant SBC.; ASI.
Q: "And the payment was actually for twenty-five thousand?"

Answer:

I think so."

Defendant SBC' internal memo, conveyed to petitioner Boyd's witness offering money to alter his report in defendant SBC' favor

*Defendant SBC" sent a letter addressed to petitioner Boyd's witness Mr. Burgess offered money to alter his report in favor of defendants "SBC"
On the stand in cross-examination, Mr. Burgess testified that he did receive this letter, however it was too dangerous to accept.

Content of defendant "SBC" letter to the witness:

"Mr. Atterbury, I am attaching the invoice from Burgess consulting. The firm that attempted to perform a data recovery after alleged incident. I have left messages with Burgess to discuss adding some more favorable narrative on the invoice."

Exhibit "117" Letter of defendant (SBC) executive addressed to plaintiff's witness, Mr. Burgess, the owner of the Computer recovery center.

Summery

Petitioner Boyd is a writer of historical events. He studied philology, linguistics, and writing Novels and screenplays in # 1 Amira Platz, Munich Germany. Petitioner continued his study in private Academy for higher education, 29 Friedrich Strasse Munich Germany, and graduated in Thermodynamics. In New York City, he went to RCA and graduated in electronics.

Thereafter, Boyd moved to Florida, Fort Lauderdale where he coached Martial Arts students for 5 years. In late 80's, he started researching, and writing his screenplays, and in mid and late nineties, his work was copy-written in the Library of Congress, Washington DC. And in office of Secretary of State, Sacramento, California. Boyd also copy-wrote his work in the writers guild of America, Los Angeles, California...

This case has been in courts since 2001. This action arises of the loss of three Screenplays, stories, treatment and information on a computer of plaintiff. Following the attempted ("DSL") installation performed by defendant "SBC" Advanced Solutions Inc, also known as "ASI"

On December 14,2000, defendant/respondent SBC Advance Solutions Inc, also known as ASI sent a technician to install a Digital Subscriber Line ("DSL") on Boyd's computer.
While attempting, to install ("DSL") defendant's employee intentionally and recklessly deleted plaintiff Boyd's screenplays, stories, treatments and personal information. Ultimately attempts to

retrieve plaintiff's deleted literary works were unsuccessful.

The Loss of plaintiff's three screenplays and stories resulted in a loss of production and screenwriting-fees, and had a devastating impact on Boyd.

Petitioner Boyd suffered an immense financial loss and emotional scarring for life by losing his decade of very hard research work. It was a devastating blow to plaintiff future career in the entertainment industry.

Petitioner Boyd had entered into contractual relationships with production company Avrora film company based in Berlin Germany agreeing to pay plaintiff $900,000.00. USD for each of three (3) projects, plus additional compensation so called backend money after the release of the three motion pictures.

Plaintiff filed a complaint against the defendant including causes of action for Gross negligence, intentional misrepresentation and interference with prospective economic relations. This matter proceeded to trial in September and October 2004.

The jury rendered a special verdict, finding liability on the part of the defendant and awarded total compensatory damages of $60,000.00.

The jury found that defendant's employee was acting in scope of his employment when the incident occurred, the defendant was negligent, and the negligence of defendant was a substantial factor in causing harm to plaintiff and plaintiff did sustain damages.

The jury decided in its verdict that the defendant made a false representation of an important fact to plaintiff Boyd.

The jury also found that plaintiff Boyd and the motion picture Company "AVRORA" had an economic relationship that would have resulted in an economic benefit to Boyd.

The jury found that the defendant engaged in conduct made with Malice, oppression and fraud and awarded punitive damages for $33,000.

Plaintiff Boyd moved for a new trial on the issue on the insufficiency of the evidence to justify the verdict on the amount of punitive and compensatory damages requiring a new trial on the amount of punitive and compensatory damages or an additur.

Code of civil procedure section 657(5)

"An additur is authorized on the grounds of inadequate damages and if there is a believe that the damages awarded by the jury are not proper."

Notice of entry of judgment was filed and served on December 9, 2004, and notice of appeal was filed on March 7, 2005 with defendant's notice of cross Appeal on punitive damage only, being filed on March 24,2005.

The superior court trial judge upheld the verdict denying a new trial. On November 16, 2005 plaintiff moved for a new trial in the California state second appellate district division two, on the insufficiency of the damage awards.

On July 5, 2006, state appellate court not only denied a new trial but also, waived jury's and trial judge's punitive award in its entirety and rescinded plaintiff's legally stipulated contract stating that it was excessive and upheld the contributory negligence clause.

Defendant SBC' employee was in plaintiff's office for eight hours alone, crashing Plaintiff's computer and intentionally deleting plaintiff's decade of hard research work.

It was not like two parties involved in an act.

*Record indicates, that plaintiff in pretrial, objected to the contributory negligence clause, stating that it was contrary to the Law, and asked that his objection to be noted on record.

Negligence § 902, Kleinclaus v. Martin Realty Co. (1949) 94 C.A. 2d 733). (94 C.A. 2d 738.)

"A Person may use his own property for any lawful purpose, and "cannot be required" to curtail or change his method of use because of wrongful acts of others. It is not contributory negligence to neglect to take precautions to avoid future injury, which can only occur as the result of "another's negligence."

Plaintiff should not be required to take precaution from the action of defendant's
employee deleting the screenplays from his hard drive.

"Had defendant not have done so, plaintiff's screenplays would have still been there."

The doctrine of contributory negligence has no place for damages for injury to property.

Appellate court's argued base of negligence on the part of Plaintiff, was, plaintiff Boyd should have copied on Floppy disk and taken his projects to the safe deposit box.

This ignored the testimony of defendant's start witness Mr. Albi, who testified on behalf of the defendant that floppy disks are unreliable.

This ignores the fact that the draft of one of plaintiff's screenplays the "color of Tulip" Was backed up by floppy.

Petitioner Boyd provided factual assertion, that the computer-data recovery Center Mr. Patel's report(Exhibit "19) clearly indicates, that the screenplays were on plaintiff's computer before defendant SBC deleted them.

Miss Gemma Valdez's testified on the Stand, that she even proofread many parts of plaintiff's screenplays.
As to the content of the screenplays, she stated that each of the plaintiff's screenplays was "3' inches thick.

As to the value of the screenplays, Mr. Field, testified on the stand that Boyd's stipulated amount of contract was not excessive.

Mr. Fields is associated with Warner film studios and new line Cinema. Mr. Field's literary works are being taught in various Universities in US.

Mr. Field teaches screenplay writing in 12 countries around the world.

Civil Code Section 333 prescribes

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

Here the plaintiff's detriment cause was the loss of the three (3) screenplays stipulated for $2.7 million.

Mr. Krapivsky director of operations, and Mr. Moshkovits, the head of the "AVRORA" film studio testified as to validity, terms and condition of contract, and availability of funds that the contract was drawn, the money was available, and the owner of the studio agreeing to pay petitioner Boyd the above noted amount for Boyd's screenplays.

"AVRORA" film company studio-heads testified on the stand that they have invested in 2001, $30,000,000.00 USD for financing the movie" Little Vampire" and "Werewolf in Paris"

These movies were distributed in USA through "the WARNER BROTHERS and NEW LINE CINEMA." "AVRORA" film testified that "AVRORA" film studios have bought the "Pennin" story from the writer and paid him $500,000.00 USD in advance.

"Avrora" film studio heads stated that the project "Pennin" And it is not made to a movie as of yet.

The question if the "Pennin" writer was a first time writer, "AVRORA" film's answer was positive.

Los Angeles County v. Bitter (1951)

"Cases discussing a motion for new trial brought on the grounds of inadequate damages have determined that a motion for new trail on the issue of damages alone may be granted where the evidence of liability is overwhelming."

"Balantine film" in Kingston New York communiqué, (letter of commitment).

Defendant "SBC" did not refute the existence of plaintiff's screenplays on his computer hard drive before the deletion.

*Analysis of petitioner Boyd's Computer hard drive, (reported by Mr. Patel) indicated that the screenplays " Color of Tulip", "Blood on Ice" and "Blood on seven Hills the "Genocide" story were inputted on his Computer.

Boyd's entire research work, three screen plays were intentionally deleted in three different times of the day between 1 PM, & 3 PM.

Computer data recovery center analysis Mr. Patel's report dated March 18, 2004.

"Advance computer repair was asked to recover information lost (or deleted) on a hard drive received, and then was asked to see which files were modified (deleted) on December 14, between the hour 1 PM & 2:05 PM and later during the same day. ACR has done a complete examination of the Samsung hard drive model, (NO. SV1533D,

S/N: 0192J1FN113123) ACR used twice. When the files were copied, their properties were examined for modifications (deletions) done on December 14,2000 during the timeframe 1:00 PM& Later on the same day. (ARC found 4 corrupted files with extension*.CSW, modified (corrupted) on December 14,2000 at 2:05 PM. 1 file with extension*. MP modified (corrupted) on December 14, 2000 at 1:17 PM. Additional corrupted files were found on the same day. (They are on supplied CD). After searching through 271 Mb of information that included 2,166 files of 237 folders, the files found are located on the disk provided. The listed names, or programs are files found modified on December 14, 2000. (The meaning of files found modified is the result of a change or deletion or corruption.
Advance Computer repair has completed its examination of the hard drive. The data recovery was attempted at least twice, and the files found modified (corrupted) on December 14, 2000 are listed in the disk provided. Advance computer repair wishes good luck, and hopes our Analysis will be useful to your case."

***Jury declared defendants liable, and fraudulent with malice and granted to the plaintiff money. That makes the plaintiff the prevailing party.**

There was un-refuted evidence presented at the trial that a contract had been entered into between the petitioner Boyd and the German based motion picture.

The jury's answer as to the above was a "yes"

***Record indicates that Boyd did argue strongly that the compensatory damage award was not sufficient.**

***Boyd did argue that the jury's decision awarding low punitive damage award was a result of Passion."**

Record shows that petitioner Boyd in his brief argued the fact that the jury was inundated by defendant's star witness Bob Gale, from the entertainment industry, who called plaintiff a NAZI, stating that his screenplays would be of interest to the Nazi's, so did the defendant's attorney Miss Davis, hence triggering jury's passion.

***As to compensatory damage award, the record in Boyd's brief indicates Boyd's strong objection to the insufficiency of compensatory damage award.**

Plaintiff paid $5,600.00 for trial transcript, and appealed the decision for insufficiency of damage awards.

Only then, defendant took advantage, heaved and piggy bagged, using plaintiff's trial transcript and cross-appealed the punitive damage award only.

On December 18, 2006, plaintiff appealed the decision of the appellate court in the federal Central district court seeking judicial review.

On July 22, 2006, the request for the review was denied. On March 7, 2007 plaintiff brought this case for review in the ninth circuit court of appeal in California, Los Angeles County. On August 5,

2008, the ninth circuit court denied the judicial review.

On September 5, 2008, the request for the Rehearing was denied, and filed on September 15, 2008.

On causes of action:

A. Concealing evidence where the defendant admitted its sole culpability.

B. Conspiracy to the fact, defendant trying to bribe plaintiff's witness. The witness at the trial stated that it was too dangerous to accept.

C. Defendant gave $25,000.00 to the person who caused the heinous act to disappear. He took the money and never came to trial. This employee was working only for six months for the defendant SBC.

D. Documentary evidence, exhibit "105" states that the employee who caused the intentional Injury was fired. This document is written and signed by the vice president of the company.

E. Ratification of employee's heinous act. (Defendant had prior knowledge of its employee's heinous act.) Had the jury seen the evidentiary document exhibit 105, then, the jury would have granted plaintiff his entire loss.

"[Citation.]"(1923) C.A. 423, 433, 437. Redemeyer v. Cunningham.

"The exclusion of clearly admissible evidence by the trial court of material issue is reversible."

82, Ill. 2D 393, 45. Ill. 175, 183, 412 NE 2d.526, 534. Wherlein v. U.S. 746 F. Supp. 887, 793 F. Supp. 898, 36 B FPD 4th- 404. Code of civil procedure, § 657, "Punitive damages"
"A cause for emotional distress was sufficient to create jury question as to entitlement to damages; punitive damage award must be imposed in case of misrepresentation, reckless disregard of property."

D. N.Y. (1994) Portee v. Hastava, 853 F. Supp. 597 104 F.
3d, 349. Damage, 15, 87,10

"Compensatory Damages serve to make injured Party whole and Put party in as good a Position as he would have been in, had wrong not done to him."

Harvey, 141 B. R. 164, 36B FPD 4th –405

"Plaintiff may recover emotional distress without proof of other damages such as physical manifestations of the emotional distress, if defendant's conduct was extreme and outrageous, caused, emotional injury. Representation was false, or lack of an honest belief in its truth, or the making of the statement was in a positive manor not warranted by the information that the defendant possessed, that the statement was made with the intend to induce reliance, and the plaintiff justifiably relied on the false representation, hereby suffering damage."

According to the law evidence supporting negligence liable, declared by jury, must be considered the successful and prevailing party.

*Jury declared defendants liable and fraudulent and awarded petitioner Boyd money, accordingly the petitioner Boyd is the prevailing party.

Defendant's attorney at closing argument stated that, in the State of California, punitive damage award constitutes 4-9 times the compensatory damage award.

Boyd did discuss all the evidence favorable to his portion.
Boyd argued that the insufficient jury verdict amount was a result of passion.

This hired individual, Bob Gale from the entertainment industry admitted receiving from defendants $30,000.00 to testify. On cross examination on the stand, SBC star witness

Mr. Bob Gale, admitted that in the past, he always testified on behalf of big corporations and his hourly rate was $400,00.

Furthermore, at the trial in cross-examination, this witness admitted that he always lied, and he was a masochist.

This witness, entertained the jury for one and half hour telling them jokes, and talked about his great connections in the movie industry.

Defendant's witness Bob Gale completely mesmerized and enthralled the jury.

Defendants cannot have both ways.

On one hand defendant SBC, did not object to the jury special form; on the other hand, after they had

been declared fraudulent, defendant SBC, complained the jury form was defective.

Crici v. Security Ins of New Heaven. Conn, 426 p. 2d 173, 58 Cal. Rptr. 13,66. Cal. 2d. 425.

"Awards for mental suffering are not confined to cases where mental suffering was in addition to personal injuries."

Cal. 9 (Cal) 2002 Bender v. Darden Restaurant Inc. 26 Fed. Appx.726.

Code of civil procedure, section, 657(5) punitive damage.

"Under California law, to sustain award of punitive damages, plaintiff need only prove prima facie case of liability as result of wrongdoing."

Cal. APP dis. (1985) California State Auto ass, inter Ins Bureau v. Carter, 210 Cal Rptr 140.164 Cal. APP. 3d 257, 54, A. L. R. 4 1177.

"Punitive damages awarded on basis of "none intentional" Torts, which arise from conduct, which constitutes reckless disregard for another's right."

Dethloff v. Zeigler Coal Co.

"Trial court decides as a matter of the law whether punitive damages are justified."

(1988) N. E 2d.1, 6, 178 Ill. App. 3d 169,127 Ill. 3, 388, 533. Motsch v. Pine Roofing Co.

As a matter of the law, the trial court decides if the punitive damages are justified.
Kelsey v. Motorola, Inc. (1978). 74 Ill. 2d, 172, 23 Ill. Dec. 559, 565,384 N. E 2d, 353, 359.

"As a matter of the law, the trial court decides whether punitive damage is justified in a particular case."

Koch v. Goldway
607 F. Supp. 223, affirmed 817 F. 2d 507. "Purpose of Eight and fourteenth Amendment. ED. Wis. (1996) 921 F. Supp. 590 Const Law 272 (2).

"Actual and proximate causation of emotional distress by defendant is sufficient for punitive damage award.

4th circuit, September 24, 1996) Marjory M. Parson v. Lalita Norton.

"[I] t is not an appellate court's province to substitute its judgment for that of trial judge.]"

Evidence "105"

A crucial evidence, which is bastion of any case where a person's entire case does depend, must be allowed for review to the decision-making entity.

(FRCP)(1) 259 F3d 1101,1106.

"Absent substantial justification for failure to make required initial disclosure, a party shall not unless such failure is harmless, be permitted to use as

evidence at trial on motion, witness or information not so disclosed."

Petitioner Boyd made an offer and the "AVRORA" Motion picture company accepted it. See trial exhibit 77- 78.

Petitioner Boyd's fees are noted on the budget document on above the line section.

"Had jury seen the documentary evidence exhibit "105' the defendant's admittance of sole culpability, then the jury would have granted plaintiff Boyd his entire Stipulated amount of $2.7 million, and proper punitive damage award.

Rescinding jury and trial judge's punitive damage award in its entirety was an error in the law.

Rescinding plaintiff's legally stipulated contract by stating that it was excessive was an error in the law.

Gibson v. Total Car Franchising Cor.

"The reprehensibility of defendant was sufficient to support jury finding of malice. The ratio of punitive to compensatory
damages was only about, 3.12 to 1. Which was basically equal to treble damages."

E.D.N.Y. 1994. Portee v. Hastava,

853 F. Supp. 597. "On reconsideration, affirmed 104 F.3d 349. Damage 15, 87 (1)

Compensatory damages" serve to make injured party whole and "put party in as good a position as

he would have been in had wrong not done to him."

What it points to, is, that If this court allows California State appellate courts decision to stand, in a broad sequence of thought, public trust in the justice system would be diminished.

Moreover, not only Boyd's entire life time research work would be gone into the oblivion, but it would also diminish others right in the future.

["4 THE AMENDMENT".]
"Mere existence of concrete harm does warrant Compensatory and punitive damage award."

To complain that the jury form was defective is not fair.
petitioner Boyd was not compensated what so ever.

U. S. C. 1331. United Sates Code.
(1982, 8th Cir) 647, 664, 96. 459. U.S. 1040, 103 S. CT, 456, 74 L. Ed. 2d. 608. See ID, at 1448. (1990) 494. U.S. 1056, 110 S. Ct. 1524, 108, L. Ed. 2d. 764, 451 U.S. 910, 101, S. Ct. 1980, 68 L. ED 2.d. 299. Cal. 9 (Cal 2002).

Schneider v. County of San Diego. 285. F. 3d 784.
Compensatory damages serve to return the plaintiff to the position he or she would have occupied had the harm not occurred.

Petitioner Boyd's former attorney and the defendant's attorney prepared the jury form.

Evidence presented to the jury, moved the jury to declare defendant SBC liable, negligent, and

fraudulent with "malice" with intention of causing harm to petitioner Boyd.

After Boyd filed an appeal on insufficiency of punitive and compensatory damage award, Defendant used a litigious strategy; cross appealed the punitive damage award only.

[Supremacy of the Constitution article "3"]
"Safeguarding the seventh Amendment, full factual record must be reviewed, and if defendant's culpability is proved the punitive damage award must be imposed.'

REASON FOR GRANTING THE WRIT

Petitioner Nikrouz Ghazibayat, aka, Boyd a Citizen of the United States, is a writer, and independent film producer of historical events. Petitioner's civil rights right for a jury trial had been violated.

Petitioner seeks relief under, 4th, 7th, 8th, and 14th, United States congressionally created Amendments, and respectfully requests the petition for writ of certiorari be granted for the following reasons:

A concrete harm was inflicted upon the petitioner. Hindsight at a trial by jury, Petitioner/plaintiff Boyd prevailed.

Defendants SBC, Inc.; also known as ASI, were declared negligent, liable.

Jury declared defendants SBC.; ASI, committing an act of oppression, fraud with "malice."

Defendants SBC, appealed the jury's decision In the Court of appeal of the state of California, second district division two.

California State Appellate court rescinded the jury and trial judge's decision, stating that the jury form had a flaw.

"New trial was not authorized.

Judicial power, title 28, doctrine of implied law of jurisdiction.

United States Supreme Court, 204 U. S. 321, 27.S. (1974) m. d. n. 223, F.rd. 265. Con. 415. U.S. 452, 4. S. Ct. 1209. 39 Led .2d, 505.
"Federally created Constitutional Amendments cannot be obviated by State court's ruling."

(3rd Cir. 2001) "The United States Supreme Court, Referring To the 8th and 14th Amendments, justice be served a new trial must be authorized."

Promulgation of Federal rules of procedure, federal conformity act.

"Jury being the Constitutional tribunal proving facts in courts of law." Id. At 1762. The Constitution. 3.2.7.1.1. Civil rights, title VII, 42 U. S. C. 2000(e) Ct 286. 51L. Ed. 504. 1907, the federal jurisdiction, Article "3" Rule of Common law, States cannot exercise independently."

Adopted November 1972 "State of California is an inseparable part of Unites States Constitution; the U.S. Constitution is the supreme law of the land."

"Statutory authority of the "4th" Amendment.
"Mere existence of concrete harm does warrant Compensatory and punitive damage award."

(7th Circuit 1998) Emotional distress, Friedlander v. Friedlander.

"Jurisdiction exists if action involves collusion and fraud."

U. S. C. A, 8, 14. -Estate of Frank v. City of Beaver Dam. 921 F Supp. 5900. – Cons judicial code, 28. U.S.

"Supreme Court opined to constitute "punishment" for the purpose of eight Amendment and fourteenth Amendment analysis, false representation and reckless actions is sufficient to impose punitive damage award. The punitive damages are proper by act of negligence."

225 F. 3d 1042, Chabner v. United of Omaha life Inc, Due process clause of the 14th Amendment.

"If there is evidence of culpability, misconduct caused by a defendant under the 14th Amendment the punitive damage award must be imposed, the State courts have no rescissory authority over federally created Constitutional Amendments."

(1st Cir. 1978) 220F. Sup. 490, S.D. NY. 1963. 580 F2d. 655. (3rd Cir. 1968) 397. F. 2d 1, Fraley v. Chesapeake.

"When a suit is brought in the district court based upon federally created right, then the federal statutes as to Amenability of suit governs."

Boyd's years of research work was sent into the oblivion with it Boyd's own life. Even the litigation, and attorney's cost Boyd had to pay.
4th Circuit, September 24 1996) Marjory M. Parson v. Lalita Norton. "It is not an appellate court's province to substitute its judgment for that of trial judge."
(1980) 82 Ill. 393, 45 Ill. 175, 183, 412 NE 2d. 526, 534. Haslip, 111 S. Ct. at 1044-46.
The Supreme Court decided, "The trial court judge only requires to decide over the Amount of the award and not its decision to submit the issue of the punitive damages to the jury the initial measure of punitive damages."
Rule of common law.
"If there is a flaw in any part of a case then the whole case must be retried again"
["Constitutional law"] 162 (1) Due process clause of 14th Amendment, (M. D. N. 23004) 223 F. rd. 265. 303, damage, 94.8.
"The case was remanded and new trial authorized."

CONCLUSION

Petitioner respectfully requests that this petition for writ of certiorari be granted, and, as such, the punitive damage award be restored, and a new trial be authorized on insufficiency of punitive and compensatory damage awards, with the Exhibit "105" be admitted or any other relief deems just and proper.
Date, December 4, 2008

Respectfully
Nikrouz Ghazibayat
In pro per

Second Appellate District
Court of Appeal Case No. B181807
LASC Case No. BC263588

APPENDIX A

SECOND APPELLATE DISTRICT
COURT OF APPEAL CASE No. B 181807
LOS ANGELES COUNTY SUPERIOR COURT
CASE No. BC 263588

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

NICHOLAS BOYD, Plaintiff and Appellant, v. SBC ADVANCED SOLUTIONS, INC., Defendant and Respondent.	B181807 (Los Angele County Super. Ct. No. BC263588)

APPEAL from a judgment of the Superior Court of Los Angeles County. Conrad R. Aragon, Judge.. Affirmed in part and reversed in part.

Law Office of Richard T. Ferko and Richard T. Ferko for Plaintiff and Appellant.

AT&T West Legal Department and Gleam O. Davis for Defendant and Respondent.

Nicholas Boyd (Boyd) sued SBC Advanced Solutions, Inc. (ASI), for damages after one of its technicians, in the process of installing a digital service line (DSL), erased three screenplay projects from Boyd's computer. The jury awarded Boyd $27,000 in net compensatory damages on his negligence cause of action and $33,000 in punitive damages. Boyd appeals on the following theories: (1) there is insufficient evidence to support the jury's decision to award such a low amount of compensatory and punitive damages; (2) there was insufficient evidence for the jury to apportion 55 percent of the fault to Boyd; (3) contributory negligence does not apply in
negligence actions involving injury to property; and (4) the trial court erred when it refused to reopen the case to admit exhibit 105. ASI cross-appeals, claiming, inter alia, that the award of punitive damages was improper because the special verdict form allowed the imposition of punitive damages only if it was found liable for an intentional tort. Because the cross-appeal has merit but the appeal does not, we reverse the punitive damages award. In all other respects, the judgment is affirmed.

FACTS

The complaint

Boyd alleged the following facts and theories.

Boyd, also known as Nikrouz Ghazibayat, spent years researching and preparing scripts[1] and stories entitled "Color

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1 The words "scripts" and "screenplays" are used interchangeably in this opinion.

of Tulip," "Blood on Ice," and "Blood on Seven Hills"[2] (projects). He entered into relationships and contracts with production companies and publishing companies to produce and publish the scripts and stories. On December 14, 2000, ASI sent a technician to provide an internet connection and DSL installation for Boyd. The technician negligently performed work on Boyd's computer so as to delete his scripts, stories, treatments and information. Boyd attempted to contact ASI on numerous occasions, but he was repeatedly put on hold, cut off and even laughed at. Thereafter, ASI and others negligently attempted to recover the lost information and caused it to be permanently lost.

ASI knew the technician was unqualified, and its supervision was grossly negligent. It also knew the nature and importance of the information on Boyd's computer.

Boyd alleged causes of action for negligence, gross negligence, breach of contract, conversion, fraud, and interference with prospective economic advantage.

The trial

When the trial commenced, Boyd announced that he would be proceeding on causes of action for negligence, fraud, and negligent and intentional interference with prospective

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[2] The words "scripts" and "screenplays" are used interchangeably in this opinion. According to the opening brief, "Blood on Seven Hills" is also known as "Genocide." This conflicts with testimony suggesting that "Blood on Ice" was about genocide and that "Blood on Seven Hills" was about Mussolini. Regardless, any reference to a story entitled "Genocide" refers to one of the three stories encompassed by the projects.

economic advantage. In the main, Boyd's case was comprised of his testimony and the testimony from Edward Krapivsky (Krapivsky) and Boris Moshkovits (Moshkovits).

ASI called Michael Robert Gale (Gale) as an expert. An important part of ASI's defense was the cross-examination of Steven Gary Burgess (Burgess), a data recovery specialist.

Boyd testified that he spent years working on "Color of Tulip," "Blood on Ice," and "Blood on Seven Hills."[1] He estimated that he spent $60,000 to $70,000 researching and creating those projects.

On December 14, 2000, ASI sent James Kassenborg (Kassenborg) to install DSL in Boyd's home.

While working on Boyd's computer, Kassenbors said that certain icons and files
were not needed and deleted them. A data

recovery specialist could recover no more than bits and pieces of Boyd's scripts, stories and treatments; whole drafts were unrecoverable.

As told by Boyd, Krapivsky agreed to produce "Color of Tulip," "Blood on Ice," and "Blood on Seven Hills" for $2.7 million.

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3 In his opening brief, Boyd states that "[these scripts, stories and treatments were inputted on his computer." Boyd did not provide a record citation for this factual assertion.

On cross-examination, Boyd was unable to recall the date when Krapivsky first orally agreed that they had a deal. However, Boyd did say that sometime prior to December 27, 2000, was when Krapivsky agreed on behalf of Aurora Media to produce the projects.

Later in his testimony, Boyd was asked about an e-mail that he sent to Krapivsky in January 2001.

The e-mail stated: "Please let me know how long do I have time to rewrite the screenplay 'Genocide' and if my fee, which was noted in the budget (already submitted), is acceptable to you. For Hollywood standards, it is really a minimum for that kind of a big, huge, full feature-length motion picture true story never made before, all three my stories with the present special effects techniques, animation. ... f[¶] ... [¶] Excellent cast, 'A'-rated actor, and 'A'-rated director, and a good production staff will bring over a billion U.S. through the box office revenue, domestically, internationally, internet, syndicated network, and video. If I would participate as a co-producer and/or consultant in all three projects, I guarantee you the projects will be far better than the movies 'Gladiator,' 'Schindler's List[,]' or ['Ben Hur.'] As you know, these films brought
over a billion dollars each. Again, it is completely at the discretion of the production team to decide."

Continuing on, the e-mail read: "In conclusion, please give me an idea just how much your company would consider what all my three screenplays are worth to your company and when I would get paid. I spent great deal of money and risk and time for research. I really have to know. I need development money to finish and to send you the script ASAP. As you know, it falls under the guidelines of the Screenwriters Guild of America."

Boyd was asked whether it was true that, according to this e-mail, he still did not know how much Krapivsky was going to pay for the scripts. Boyd replied: "No, we knew that. It was already set. Usually you go double sold is a better sold. So at the end see, he wanted me to recreate." When Boyd was asked if he sent the e-mail to get an idea of how much Krapivsky's company would consider paying, Boyd asked if it was a rhetorical question. The trial court told Boyd not to argue and to answer the question. Instead of answering yes or

no, Boyd said he wrote the e-mail to highlight the financial rewards of increasing the budget and hiring A-list actors and directors. He also said he wanted to cover himself because a friend told him to put things in writing.

Asked if he was a member of the Writers Guild of America,[2] Boyd testified: "I was [a] member of Screenwriter Association of America with hall of fame, with much more famous, more members."[3]

Boyd admitted that before and since December 14, 2000, he has never received compensation as a screenwriter or producer.

Krapivsky

Krapivsky explained that he is a freelance producer for Aurora Media, and his job is to seek out and manage projects. The company, which is based in Berlin, Germany, made films like

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4 The Writers Guild, of America is a union for professional writers, including screenwriters. It is involved with contract negotiations with producers and studios on behalf of its members. (See www.wga.org.) The Screenwriters Guild of America, referenced in Boyd's January 2001 e-mail, is now known as the Screenwriters Federation of America. It is designed to help professional and aspiring screenwriters market their work. Membership is open to anyone who sends in an application and pays dues. (See www.screenwritersfederation.org.)

5 The American Screenwriters Association was organized to promote and encourage screenwriting. Membership is open to anyone who sends in an application and pays dues. (See www.asascreenwriters.com.)

"American Werewolf in Paris," among others. After Krapivsky saw the draft script for "Color of Tulip," the treatment for "Blood on Ice," and the synopsis for "Blood on Seven Hills," he brought them to the attention of Alexander Bookman (Bookman), the owner of Aurora Media. Bookman decided he wanted to pursue the projects, so Krapivsky informed Boyd that Aurora Media was interested in working with him. Afterwards, Boyd sent a contract and budget proposal to Aurora Media providing that he would be paid $900,000 for each of the three scripts and related productions.

According to Krapivsky, he called Boyd in November 2000 and said Bookman was "willing to do it if [you] will provide us with the scripts." Krapivsky told Boyd he would be paid $2.7 million. In particular, Krapivsky testified: "I... said that generally we liked the idea, we see great potentials [sic], and we would like to proceed with this projects [sic] and we would like to receive the scripts as soon as possible. I told [Boyd] the situation in Germany is very good with the funds, that financing could be secured, and so on."

The idea was to go into the German tax shelter market for funding for the movies. In order to get financing for a movie from a German tax shelter fund, Krapivsky needed a completed screenplay, proven professionals with track records in the film industry, a completion bond, and a production services agreement. However, he never received any screenplays from
Boyd, and he did not have any directors identified. He admitted that could not get a completion bond without a screenplay. Even if he had a screenplay, he testified that it would have to be presented to the completion bond company, which could always decline to issue a completion bond. Also, a German tax shelter fund could decide that it did not want to invest in the movie project.

Krapivsky testified that the managers of the German tax shelter funds (fund managers) would have to approve how much the director was paid and how much the producer staff was paid. He was asked, "And isn't that also true for deciding how much you are going to pay the screenwriter?" He answered, "Well, in terms of screenwriter, we knew how much we have to pay." He did not provide a further response.

Moshkovits

According to Moshkovits, Aurora Media agreed to pay Boyd a third upon delivery of a particular screenplay, a third upon production and a third as each movie project was completed.

Burgess

Burgess owns a company called Burgess Consulting and Forensics. It does data recovery, computer forensics, data transfer and conversion. Boyd asked Burgess to recover data from a hard drive and he agreed. ASI promised to pay for the recovery effort.

Ultimately, Burgess was able to find part of one screenplay on the hard drive, but nothing else useful.

On cross-examination, Burgess testified that 4,134 files were placed on Boyd's computer between December 13, 2000, and January 13, 2001. Most were added after December 20, 2000. Those files potentially took up unallocated space where previously deleted files, including Boyd's deleted stories, treatments and screenplays, might have been residing. The addition of 4,134 files created a significant risk that allegedly lost material would be overwritten. If the stories, treatments and screenplays were completely overwritten, they were rendered unrecoverable. It is possible that the lost

material could have been recovered prior to the installation of the 4,134 files on Boyd's computer.

Some of the new files Burgess found belonged to Textbrige Pro 8.0 and Photosuite software. Burgess inferred that someone had downloaded Napster and Realplayer files during the same timeframe.

Gale

Gale testified that he is a member of the Writers Guild of America, which is a union for writers, including screenwriters. The Writers Guild of America sets compensation standards. In December 2000, at a minimum, a writer would be paid $30,000 on low budget movie and $60,000 on a high budget movie. A writer could try to negotiate higher pay.

Boyd's motion to reopen the case and admit exhibit 105 into evidence

After closing argument, Boyd moved the trial court to reopen the case in order to admit exhibit 105 into evidence. The motion was denied.

Exhibit 105 is a document entitled "SBC Executive Appeal" and pertains to a customer complaint by Boyd. It states, in part: "Attorney is handling this issue on behalf of [Boyd]. One of our employees showed up to install DSL, spent 8 hours there going through files and wiped out [Boyd'sJ whole computer. We fired the employee and Mr. Jack McGovern sent a letter stating ASI would pay [Boyd] any fees he incurred for data recovery. [Boyd] is a script writer and has

scripts he needs to recover that will eventually be worth in excess of $10 million."[4]

Jury Instructions

Among other instructions, the trial court gave specific instructions pertaining to contributory negligence and damages.

"ASI claims that [Boyd's] harm was caused in whole or in part by [Boyd's] own negligence. To succeed on this claim, ASI must prove both of the following: [¶] 1. That [Boyd] was negligent; and [¶] 2. That [Boyd's] negligence was a substantial factor in causing his harm, [¶] If ASI proves the above, [Boyd's] damages are reduced by your determination of the
percentage of [Boyd's] responsibility. I will calculate the actual reduction."

"If you decide that [Boyd] has proved his claim against ASI, you also must decide how
much money will reasonably compensate [Boyd] for the harm. ... [^j] ... [^f] The following are
the specific items of economic damages claimed by [Boyd]: [[[] 1. Out-of-Pocket Losses fll]
[Boyd] may recover amounts that he reasonably spent in allegedly creating three screenplays
which were then allegedly lost as a result of wrongdoing by ASI. [f] 2. Lost Prospective

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6 The quoted document is not marked as exhibit 105. However, both parties agree that this
document is exhibit 105.

Earnings. [If] To recover damages for lost prospective earnings, [Boyd] must prove the amount
of income or earnings that he has lost to date."

The special verdict

The special verdict form asked 27 questions. Regarding negligence, the jury answered yes to questions one through four, indicating that it found that Kassenborg and ASI were negligent and caused Boyd damage. Additionally, the jury found that Boyd was negligent, his negligence was a substantial factor in causing his damage, and the proportion of his fault was 55 percent. ASI was held not liable for fraud, intentional interference with prospective economic advantage and negligent interference with economic advantage.

Question 26 asked the jury to assess Boyd's total damages. The jury determined that his damages amounted to $60,000. If, and only if, ASI was held liable for fraud, intentional interference with prospective economic advantage or both, the jury was supposed to answer question 27. That question asked whether ASI engaged in conduct with malice, oppression or fraud. Even though the jury did not find ASI liable for either fraud or intentional interference with prospective economic advantage, the jury answered "yes" to question 27.

The punitive damages phase of trial

Before the punitive damages phase of trial, ASI argued that punitive damages were not available in a simple negligence case due to the lack of malice. The trial court disagreed, stating: "Well, that overlooks the jury's finding on question number eight [pertaining to the fraud cause

of action]. They specifically found that [ASI] lied to [Boyd].[5] They also found in questions one through six ... that [Kassenborg] deleted the screenplays. And then they found on question number 27 that [ASI's] conduct was engaged in with malice, oppression or fraud. [¶] So, as to the proposition you are advancing, that there is no factual finding to support a punitive damage award because there's no malice, oppression or fraud, that flies in the face of finding number eight." Further, the trial court concluded that the requirements of Civil Code section 3294, subdivision (b) authorization or ratification of Kassenborg's conduct by a managing agent of ASI was found by the jury because it found: (1) Kassenborg was acting in the scope of his employment for ASI, (2) ASI was negligent, (3) ASI made a false representation of an important fact, and (4) ASI engaged in malicious, oppressive or fraudulent conduct.

In a separate special verdict form, the jury awarded Boyd $33,000 in punitive damages.

The post-trial motions

Boyd moved for a new trial on the issue of damages and punitive damages or, in the alternative, for addition to the damages and punitive damages. He argued that the evidence was insufficient to justify such low compensatory and punitive damages awards, and that it was error for the trial court to deny the motion to reopen the case to admit exhibit 105.

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[7] The jury found that ASI made an unspecified false representation of fact to Boyd. However, the jury also found that ASI did not know that the representation was false, and that it was not reckless regarding the truth.

ASI moved for a partial judgment notwithstanding the verdict or, in the alternative, a new trial regarding punitive damages. It argued that punitive damages cannot be awarded as a matter of law based on a finding of simple negligence when the damages were economic.

The trial court issued a tentative ruling denying both motions.

As to Boyd's motion, the trial court stated: "Although Boyd produced evidence of a contract in the millions-of-dollars range through the testimony of various witnesses, the jury was free to, and obviously did, find the evidence not credible. There was evidence presented by ASI from which the jury could have so concluded, apart from the demeanor evidence of Boyd's
witnesses (and their equivocations regarding the details of the 'contract'), [¶] The jury was also convinced that Boyd himself was negligent in not backing up or otherwise protecting his screenplays, finding him 55% contributorily at fault for deletion of the screenplays. The compensatory damage award of $60,000 was fully supported by the evidence. Moreover, given [Boyd's] own fault and the net compensatory recovery to [Boyd] of [$27,000], the [trial] court does not find that the punitive damage award was insufficient, [^f] Exhibit 105 was tardily submitted by Boyd, after the evidence had been settled, after argument and after instruction, upon Boyd's motion to reopen. The [trial] court reviewed the document which had not been shown to any witness and had not been previously authenticated. It was clear to the [trial] court from the testimony of various witnesses who testified as to similar memoranda produced by ASI employees in their handling of Boyd's pre-litigation complaints, that the exhibit was drawn up to memorialize the substance of Boyd's claim, not as a memo reflecting AST's opinions as to the merit of Boyd's claims. [¶] Finally, even if it was error [for the trial court to refuse to]

admit Exhibit 105 into evidence, it was not prejudicial. The jury obviously found that ASI had deleted the screenplays. An admission to that effect would yield no different result."

As to ASI's motion, the trial court stated; The evidence supported an inference that-even though Kassenborg was repeatedly warned by Boyd about the screenplays on the hard drive and of their value, he nevertheless deliberately deleted the screenplays from Boyd's hard drive. Kassenborg's conduct falls within the definition of malice, which is defined as the willful and knowing disregard of the rights of another. The trial court rejected ASI's contention that a negligence action involving economic damage could not support a punitive damage award. It cited *Nippon Credit Bank v, 1333 North Cal. Boulevard* (2001) 86 Cal.App.4th 486.

The trial court adopted the tentative ruling as its order.

This appeal and cross-appeal followed.

DISCUSSION

1. Compensatory damages.

Boyd argues that his compensatory damages award is insufficient. For the reasons discussed below, the compensatory damages award must be affirmed.

a. *The amount of damages.*

In his "Contentions on Appeal," Boyd tells us that there "is no evidence that supports the damage [amount] of

$60,000.00. The unrefuted evidence presented during trial established a contract had been entered in which Boyd would receive $2.7 million. [¶] The court must consider all evidence that supports the jury finding that an economic relationship between Boyd and a movie producer existed which probably would have resulted in an economic benefit to Boyd. ... The only economic relationship established was the $2.7 million contract."

Part I of Boyd's argument, which is entitled "There is Insufficient Evidence to Support the Damage Award of $60,000," cites four cases, which are: *Long Beach Police Officers Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1001 (Long Beach), *County of Mariposa v. Yosemite West Associates* (1988) 202 Cal.App.3d 791, 807 *(Mariposa)*, *Estate of Teed* (1952) 112 Cal.App.2d 638, 644 *(Estate of Teed)* and *Toyota Motor Sales, U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 *(Toyota Motor)*. We examine each of these cases.

In *Long Beach*, the Long Beach Police Department (the Department), among others, appealed from a judgment ordering the issuance of a writ of mandate prohibiting it from denying the Department's officers "a 'past practice' of consultation with a [police officers association] representative or an attorney prior to making oral and written reports concerning incidents in which an officer was involved in a shooting." (*Long Beach, supra*, 156 Cal.App.3d at p. 998.) On appeal, the Department argued that the findings of fact in the trial court's statement of decision were not supported by substantial evidence. (*Id.* at p. 1000.) The *Long Beach* court affirmed.

On page 1001, the page cited by Boyd, the *Long Beach* court set forth the following rules: "'[[I]n] resolving the issue of the sufficiency of the evidence, we are bound by the

established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment [citation]. All issues of credibility are likewise within the province of the trier of fact. [Citation.] 'In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing*.' [Citation.] All conflicts, therefore, must be resolved in favor of the respondent. [Citation.]' [¶]' *Where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court*. The presumption being in favor of the judgment. ... the court must consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of every reasonable inference, and resolving conflicts in support of the judgment.' [Citation.]" (*Long Beach, supra*, 156 Cal.App.3d at p. 1001.)

Mariposa, Estate of Teed and Toyota Motor also recite the substantial evidence test. Boyd directs us to the following language: "[I]f the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Estate of Teed, supra*, 112 Cal.App.2d at p. 644.)

Curiously, none of these cases involve challenges to the adequacy of damages. They do not support Boyd's position, which is evident when Boyd's arguments are considered. Even though Boyd cites these cases, he does not rely on them. Instead, he essentially reargues his case.

First, Boyd contends that we must accept all the evidence that Kassenborg was acting in the scope of his

employment with ASI when the incident occurred, ASI was negligent, ASI's negligence caused Boyd harm, Boyd sustained damages, and Boyd and a movie producer had an economic relationship that probably would have resulted in an economic benefit to Boyd.

Second, Boyd contends: There was undisputed evidence that he entered into the agreement for $2.7 million with Krapivsky and Moshkovits. Syd Field, Boyd's film industry expert, testified that the agreement was reasonable. The minimum range of compensation for a single project, at least according to Gale, ASI's film industry expert, was $60,000. Based on these facts, a damage assessment of $60,000 is clearly not supported by the evidence.

We turn to our review.

(1) Standard of review.

"The common law in its wisdom has left [the] inherently subjective decisions regarding damages with the jury as the trier of fact to apply its collective experience, common sense, and diverse backgrounds. As a further safeguard, the trial judge has considerable discretion to review excessive or inadequate damage awards in conjunction with a motion for new trial. . . . We do not question the discretionary determinations of jury and judge, so long as they fall within a reasonable range permitted by the evidence [Citation.]" (*Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 857 (*Abbott*).) We review the trial court's determination under the substantial evidence test, but we do so with deference. (*Id.* at p. 856; see also *Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259 [the trial court's determination whether damages are excessive is entitled to great weight because it must balance the conflicting evidence].) "Normally, the appellate court has no power to interfere except when the facts before it suggest

passion, prejudice or corruption upon the part of the jury, or where the uncontradicted evidence demonstrates that the award is insufficient as a matter of law." (*Gersick v. Shilling* (1950) 97 Cal.App.2d 641, 645.)

(2) Waiver: failure to discuss adverse facts.

Instead of providing a fair statement of the facts and a discussion of all the evidence, Boyd's appellate briefs focuses only on the evidence he deems favorable to his position. He omitted any reference in his briefs to the necessity of getting approvals from the fund managers and the completion bond company in order to secure funding, the January 2001 e-mail (the
wording of which suggested that the parties had not agreed to a contract), and his equivocations on the stand about the meaning of the January 2001 e-mail. One-sided record citations are at cross-purposes with the appellate process, which has justice as its utmost aim and strives for fairness and efficiency. (See *Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832.) In this context, "the contention that the findings are not supported by substantial evidence may be deemed waived." (*Ibid.*) Due to Boyd's failure to properly cite and discuss all relevant facts, we deem this portion of his appeal waived.

(3) Waiver: failure to discuss controlling authority.

Boyd did not discuss *Abbott*, or case law similar to it. It is important to recognize what Boyd does not argue. He does not argue that the jury
verdict was the result of passion, prejudice or corruption on the part of the jury. Nor does he argue that the award was insufficient as a matter of law. Finally, Boyd does not argue that the compensatory damages award fails to fall within a

reasonable range permitted by the evidence when it is viewed in the light most favorable to ASI. We deem this portion of the appeal waived because Boyd did not support it with argument based on the controlling law. We have no obligation to be stand in lawyers and develop an appellant's arguments. (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 1.)

(4) The jury's damages Finding was supported by substantial evidence.

When applying the substantial evidence test, an appellate court resolves all conflicts in the evidence in favor of the prevailing party, and it draws all reasonable inferences in a manner that upholds the verdict. (Holmes v. Lerner (1999) 74 Cal.App.4th 442, 445.) Evidence is considered substantial if it is "of ponderable legal significance," and if it can be characterized as being "reasonable, credible and of solid value." (Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651.) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (Id. at p. 652.)

The finding of $60,000 in damages fell within the reasonable range permitted by the evidence. It is inferable that the jury found that Boyd did not have a contract with Aurora Media, but decided that Boyd should be compensated for the money he spent researching and preparing his projects. In other words, the jury assessed damages for out of pocket losses (the first measure of damages in the jury instructions), but not lost profits (the second measure of damages in the jury instructions). Viewed in the light most favorable to ASI, the evidence showed the following. Aurora Media could not

budget Boyd's compensation until his screenplays were approved by the fund managers and the completion bond company. Krapivsky told Boyd that Bookman was interested in the projects and said to send the screenplays as soon as possible. After the projects were deleted from Boyd's computer, he e-mailed Krapivsky to see if Bookman still wanted to proceed. Boyd wanted to find out how much he would be paid if he could recreate his lost material and write the promised screenplays. At that point, the parties did not have an agreement for his services.

It was also inferable that Boyd would not have delivered a screenplay. He spent many years researching, but he never completed a final screenplay for any of his projects. In his January 2001 e-mail, he stated that he needed development money to finish his screenplays. But
he was not entitled to any money under the,purported contract until he delivered a screenplay, asMoshkovits testified. Notably, Krapivksy wanted the screenplays as soon as possible. The jury could have reasonably inferred that Boyd would not have been able to write three professional screenplays in a short period of time (even if he received development money) because he had been unable to do so during the many years he spent on the projects and, as is apparent from a perusal of Boyd's January 2001 e-mail, his writing lacks sophistication.

Having declined to weigh in on the issues presented by the adverse evidence, Boyd
cannot be heard to complain about the negative results he has achieved thus far in connection

with his appeal.

b. *Apportionment of fault.*

In this part of his appeal, Boyd contends that he is entitled to 100 percent of his compensatory damages. This contention lacks merit. Boyd advances a legal attack and an evidentiary attack. In his legal attack, he argues that fault cannot be apportioned in cases involving injury to property. In his evidentiary attack, he contends that the evidence did not otherwise support the jury's allocation of fault.

The evidentiary attack in his opening brief, in its entirety, states: "The argued basis of negligence on the part of [Boyd] was that he could have backed up his material with floppy disks. . ... This ignores the testimony by even the computer witness on behalf of the defendant that floppy disks are unreliable. . . . This ignores the fact that 'Color of Tulip' was backed up by a floppy disk. It was argued by the attorney for [ASI] that if you have something valuable you should put it in a safe deposit box. . . . Obviously, the numerous documents created by [Boyd] would not fit into a safe deposit box. [¶] [Boyd] did not reasonably expect that [ASI] would wipe out and delete documents on his computer during the DSL installation. The holding of [Boyd] to be 55% at fault for [ASI's] deletion is wrong, [¶j] ... [¶] Further, how can Boyd be more liable than the wrongdoer. The apportionment of 55% to [Boyd] and 45% to [ASI] is not supported by evidence or law."

Below, we explicate the deficiencies of these attacks.

(1) Standard of review.

Our task is to review the jury's apportionment of fault under the substantial evidence rule, considering the evidence in the light most favorable to ASI, giving it the benefit of every reasonable inference and resolving conflicts in support of the judgment. (*Von Beltz v. Stuntman*,

Inc. (1989) 207 Cal.App.3d 1467, 1480-1481.) In carrying out our function, we are not permitted to reweigh the evidence. (Ibid.) "[T]he jury's power to apportion fault is as broad as its duty to resolve conflicts in the evidence and assess credibility." (*Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1234.) We "'may not substitute [our] judgment for that of the jury or set aside the jury's finding if there is any evidence which under any reasonable view supports the jury's apportionment. [Citation.] [Citation.]" (*Ibid.*) "[T]he testimony of a single witness, even [of a party], may be sufficient. [Citation.]" (*Jensen v. BMW of North America, Inc.* (1995)35 Cal.App.4th 112, 134.)

(2) Waiver: failure to object to apportionment of fault at the trial level.

The parties tried their respective cases, which included Boyd's cause of action for negligence and ASI's affirmative defense alleging contributory negligence. Boyd did not object to the contributory negligence instruction to the jury, nor did he object to the question relating to contributory negligence in the special verdict form. It is too late in the day for Boyd to argue that fault could not be apportioned in this case. "Contentions or theories raised for the first time on appeal are not entitled to consideration. [Citations.]" (*City of San Diego v. D.R. Norton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 685.)

(3) *Waiver: failure to discuss adverse facts.*

By neglecting to discuss the adverse facts such as the evidence that 4,134 files were placed on his computer after December 14, 2000 Boyd abdicated his appellate duty. Hence, we find a waiver.

(4) The apportionment of fault is supported by substantial evidence.

Academically, we conclude that Boyd's thin analysis is insufficient.
It was Boyd's challenge to explain why the evidence most favorable to ASI was deficient as a matter of law to support the apportionment. But Boyd avoided the challenge. Once again, he simply reargued his case and presented the evidence he deemed most favorable to his position.

Giving the evidence a slant that insulates the apportionment of fault, we conclude that Boyd, or someone who had his permission, installed 4,134 files on his computer after December 13, 2000, and destroyed Burgess's ability to recover anything that may have been deleted by Kassenborg. Corollary to that, we presume that if those 4,134 files had not been installed, the files that may have been deleted by Kassenborg would have been recovered. As Boyd admits, he had "Color of Tulip" backed up on a floppy disk, so he did not lose that material. He could have
easily backed up his other work on floppy disk, but he neglected to do so. Based on these facts,
the jury reasonably concluded that Boyd was 55 percent at fault for his losses.

2. Denial of the motion to reopen to admit exhibit 105.

Boyd argues that it was error for the trial court to exclude exhibit 105. He relies upon *Redemeyer v. Cunningham* (1923) 61 Cal.App. 423 to support his contention. His reliance is misplaced. In *Redemeyer,* the appellate court held that it was error for the trial court to exclude evidence of actual possession of property in an action for adverse possession. (*Redemeyer, supra,* at p. 433.) We fail to see the relevance. *Redemeyer* was not a motion to reopen a

case and is inapposite. The law that must inform our analysis is this: "Trial courts have broad discretion in deciding whether to reopen the evidence. [Citation.] We review a court's denial of a motion to
reopen evidence for an abuse of discretion. (*Ibid.*) The appropriate test for
abuse of discretion is whether the trial court's decision exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, we have no authority to substitute our decision for that of the trial court. [Citations.]" (*Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 208-209.)

In his attempt to curry a reversal, Boyd's briefs falter. His opening brief merely argues that exhibit 105 "is a January 2001 SBC Executive Appeal document, which can be construed as admitting the technician wiped out [Boyd's] computer and was fired. This document points out
the inaccurate testimony of [McGovern] and [Atterbury]. It was relevant to the reprehensibility of the conduct of [ASI] and relevant to the damage issues." Instead of arguing why the trial court abused its discretion, Boyd simply argues that exhibit 105 had relevancy. The argument rings hollow because it does not confront the trial court's findings in connection with its denial of Boyd's motion for new trial. According to the trial court, exhibit 105 was never shown to a witness or authenticated, and all it did was document the substance of Boyd's claims against ASI. In other words, exhibit 105 did not reflect ASI's opinions as to the merits of Boyd's claims. Notably, Boyd did not explain how exhibit 105 would have affected the judgment. It can be inferred that the jury believed that Kassenborg deleted the projects from Boyd's computer, but that Boyd either did not have a contract with Aurora Media, or that he would never have delivered any screenplays. Therefore, even if exhibit 105 contained admissions that Boyd

could have used against ASI (which it did not), those admissions would not have changed the outcome of the trial.

Boyd waived this portion of appeal by failing to discuss the relevant issues. Though it is unnecessary for us to review the trial court's ruling, we do so in the interest of being complete. We find that the trial court ruled within the bounds of reason when it denied Boyd's motion to reopen.

3. Punitive damages.

ASI challenges the punitive damages award on several grounds, including that they cannot be awarded where the special verdict form submitted to the jury only allowed imposition of punitive damages if the facts demonstrated an intentional tort. As discussed below, we agree. Because we agree, Boyd's appeal seeking to augment his punitive damages is moot.

a. *Standard of review.*

When confronted with a question of law based on undisputed facts, our review is de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

b. *Punitive damages law.*

Civil Code section 3294, subdivision (a) provides: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Because this action involves an employer that is a corporate entity, Civil Code section 3294, subdivision (b) is also pertinent. It provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

c. *The findings in the special verdict form do not support punitive damages.*

"It is the province and the duty of the [trial] court to instruct the jury upon the law and such instructions are binding on the latter in its deliberations. [Citation.]" (*Redoy Cia v. First Nat. Bank* (1926) 200 Cal. 161, 166.) The upshot is that the jury is empowered to contravene the jury instructions when rendering a verdict. (*Boam v. Trident Financial Corp.* (1992) 6 Cal.App.4th 738, 743 ["A jury is bound to follow proper instructions, and a verdict contrary thereto is against the law"].) It has been held that "a verdict which is patently contrary to the court's instructions on damages does not cover or comprehend the issues submitted and is therefore insufficient." (*Sherwood v. Rossini* (1968) 264 Cal.App.2d 926, 930, fn. omitted.) "When a verdict and judgment entered thereon are wrong as a matter of law but the case was fully tried and no new evidence is necessary, we may

reverse and remand with directions to make requisite findings based on undisputed evidence and enter a new judgment accordingly. [Citations.]" (*Boam, supra*, 6 Cal.App.4th at p. 745 [remanding with directions to calculate the amount of prejudgment interest owed to plaintiff and enter judgment accordingly].) It follows that if new findings are not necessary, then the judgment can simply be reversed.

The trial court instructed the jury to follow the jury instructions and special verdict form carefully. Absent a finding of fraud or intentional interference with prospective economic advantage, the jury was not supposed to answer question 27 in the special verdict form (which asked whether ASI engaged in conduct with malice, oppression or fraud). Even though the jury did not find that ASI committed either intentional tort, it still answered question 27. The jury's finding of fraud, oppression or malice was not permissible, and the punitive damages award cannot stand. We therefore reverse the punitive damages award.[6]

Though we now deem the punitive damages issue resolved, our ruling is bolstered by a second observation.

---

8 ASI did not object to the defect in the special verdict below, but that does not preclude us from reaching the issue on appeal. Waiver of an objection to a jury verdict "'is not found where the record indicates that the failure to object was not the result of a desire to reap a "technical advantage" or engage in a "litigious strategy."' [Citation.]" (*DuBarry Internal., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 565, fn. 7.) There is no indication in the record that ASI's failure to object was a litigious strategy.

Neither party objected to the special verdict form. As a result, both parties must live with it. (See *Jensen v. BMW of North America*, Inc., supra, 35 Cal.App.4th at p. 131 [objection to a special verdict form must be made before the jury is discharged or it is waived].) According to statute, the "special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc.§ 624.) As a result, we will not presume implied findings in favor of a judgment that is based on a
special verdict because "'there is no such presumption in favor of upholding a special verdict. Rather a special verdict's correctness must be analyzed as a matter of law. [Citation.]'" (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 366.) The special verdict form did not contain express findings that ASI's managing agents authorized or ratified Kassenborg's conduct. We conclude that the special verdict is legally deficient on its face to support an award of punitive damages against ASI, a corporate defendant, pursuant to the clear language set forth in Civil Code section 3294, subdivision (b).

DISPOSITION

The punitive damages are reversed. In all other respects, the judgment is affirmed. ASI shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ASHMANN-GERST

We concur:

_____, P.J.
BOREN

_____, J.
CHAVEZ

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 2

DATE: October 17, 2006

Nicholas Boyd
21731 Saticoy Street
#41
Canoga Park, CA 91304

Nicholas Boyd
v.
Pacific Bell et. al.

B181807
Los Angeles County No. BC263588

THE COURT:

Request by appellant in pro per to have opinion vacated is denied.

APPENDIX-B

MEMORANDUM
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NIKROUZ GHAZIBAYAT, Plaintiff- Appellant, v. SBC ADVANCED SOLUTIONS, INC., Defendant - Appellee.	No. 07-55254 D.C. No. CV-06-08124-AHS MEMORANDUM

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, Chief Judge, Presiding
Submitted July 22, 2008**
Before: B. FLETCHER, LEAVY, and THOMAS, Circuit Judges.

Nikrouz Ghazibayat appeals pro se from the district court's order denying his request to proceed in forma pauperia. We have jurisdiction under 28 U.S.C.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Accordingly, Ghazibayat's request for oral argument is denied. *See* Fed. R. App. P. 34(a)(2).

§ 1291. We review for an abuse of discretion. *Tripati v. First Nat 'I Bank & Trust*, 821 F.2d 1368, 1369 (9th Cir. 1987). We affirm.

Ghazibayat's proposed complaint seeks review of a state court judgment, which is barred by the *Rooker-Feldman* doctrine. *See Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003) (explaining that under the *Rooker-Feldman* doctrine, federal district courts lack subject matter jurisdiction to hear a direct appeal from the final judgment of a state court). Accordingly, the district court did not abuse its discretion by denying Ghazibayat's request to proceed in forma pauperis because it appears from the face of the proposed complaint that the action is frivolous or without merit. *See Tripati*, 821 F.2d at 1370; *Minetti v. Port of Seattle*, 152 F.3d 1113, 1115 (9th Cir. 1998) (per curiam) (concluding that district court did not abuse its discretion by denying in forma pauperis application where plaintiff lacked standing, and complaint was barred by res judicata and judicial immunity).

Ghazibayat's motion to expedite the case is denied as moot.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NIKROUZ GHAZIBAYAT, Plaintiff- Appellant, v. SBC ADVANCED SOLUTIONS, INC., Defendant - Appellee.	No. 07-55254 D.C. No. CV-06-08124-AHS Central District of California Los Angeles ORDER

Before: B. FLETCHER, LEAVY, and THOMAS, Circuit Judges

The petition for panel rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NIKROUZ GHAZIBAYAT, Plaintiff- Appellant, v. SBC ADVANCED SOLUTIONS, INC., Defendant - Appellee.	No. 07-55254 D.C. No. CV-06-08124-AHS Central District of California, Los Angeles MANDATE

The judgment of this Court, entered 8/5/08, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of the Court

By: Gabriela Van Allen
Deputy Clerk

APPENDIX C-1

EXHIBIT "105"
(DEFENDANT'S ADMISSION OF CULPABILITY)

SBC Executive Appeal

Opened __/9/01, 1:32:53 PM Log# 82328 Rcvd- b LBOTHE
Due By: 1/16/01
Cus- Laam BAYAT Cus- Fnam NICHOLAS
Number of Times Customer Called: 3 FCC Source: n/a
Business: Phone: 818-766-9535
Street: City:State: CA Zip
Product ADSL (DSL) Type: IV Closed: 1/23/01 11:19:19 AM
Ref-To: Christine Thomas Ref-To-Field
Cont-Inf MELISSA MARSH. ATTY. 818-762-7831

Appeal Attorney is handling this issue on behalf of Mr. Bayat. One of our employees showed up to install DSL, spent 8 hours there going through files and wiped out his whole computer. We fired the employee and Mr. Jack McGovem sent a letter stating ASI would pay Mr. Bayat any fees he incurred for data recovery. Mr. Bayat is a script writer and has scripts he needs to recover that will eventually be worth in excess of $10 million. Ms. Marsh needs the same type of commitment letter, but committing to pay whatever data recovery company and NOT her client so she can proceed to hire someone to recover these files. Mr. McGovera is on vacation and cannot be reached. Data recovery firm will not do it with the current letter as it guarantees payment only to the client. She is trying to resolve this issue without legal action.

****

Per Diana Roy 1/'23/01: Mr. Bayat personally called the SBC Executive Office - St. Louis. Mr. Bayat again expressed desire for resolution without Legal involvement. Will forward to C.iristine Thomas with note of customer's second call

****

Per Diana Roy 1/24/01; Customer called again. Wants to fax to my attention written details on his case. Reports no return calls. Gave my fax number. Fax received.
Closure From Christine Thomas: Since Regional VP Jack McGovern was handling this and he is on vacation, I referred this to Renee Tillman, VP Data Op West, for handling.

Restricted-Proprietary Information
The information contained herein is for use by authorized employees of SBC Communications and is not for general distribution within the Corporation.

APPENDIX C-2

DENIAL OF ADMISSION OF EXHIBIT "105" (DEFENDANT'S ADMISSION OF CULPABILITY)

RECORD ON THAT NOW?

MR. STACK: YES, YOUR HONOR.

I FELT THAT THAT IS A DOCUMENT THAT APPEARED IN THE DEFENSE EXHIBIT NOTEBOOK. IT WAS EXHIBIT 105 ENTITLED "EXECUTIVE APPEAL." AND, OBVIOUSLY, AS A DEFENSE EXHIBIT, WE FELT SOMETHING THEY HAD INITIALLY PUT IN THE BOOK WOULD BE SOMETHING THAT IS AUTHENTICATING AND EXISTS.
WE FEEL IT GIVES A FURTHER COMPLETION TO THE STORY WITH REGARD TO THE CONTACT THAT WAS GOING ON BETWEEN THE PARTIES AND SBC AFTER THE INCIDENT TOOK PLACE, AND MAKES REFERENCE TO ISSUES ABOUT THE TECHNICIAN BEING FIRED AND AS TO OUR COMMUNICATION THAT WAS GOING ON.
AND WE FEEL THAT IT JUST GIVES A COMPLETE STORY AT A TIME WHEN THEY OTHERWISE HAVE INTRODUCED SOME OF THEIR NOTES INTERNALLY WITH REGARD TO COMMUNICATION THAT WAS GOING ON, AND WE FEEL IT FILLS IN A TIME PERIOD THAT IS SIGNIFICANT IN JANUARY OF 2001.
THE COURT: SO EXHIBIT 105 HAS ALREADY BEEN MARKED FOR IDENTIFICATION AS PART OF THE RECORD.
MR. STACK: THANK YOU, YOUR HONOR.

THE COURT: THE MOTION IS DENIED.

(MARKED FOR IDENTIFICATION, EXHIBIT NO. 105, EXECUTIVE APPEAL.) (BRIEF RECESS WAS TAKEN.)
(AT 10:00 A.M., THE FOLLOWING PROCEEDINGS ARE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)

APPENDIX C-3

COMPUTER DATA RECOVERY CENTER REPORT
PROOF OF INTENTIONAL DESTRUCTION OF PLAINTIFF BOYD'S INTELLECTUAL PROPERTY

Advance Computer Repair Inc.
21924 Schoenborn Street
Canoga Park, Ca. 91304
Telephone: (818) 704-1677
Fax:(818)704-1678

March 18, 2004

Dear Kevin J. Stack

Advance Computer Repair was asked to recover information lost (or deleted) on a hard drive received, and then was asked to see which files were modified (deleted) on December 14, 2000, between 1:00 PM & 2:05 PM and later during the same day. ACR has done a complete examination of the Samsung hard drive Model NO. SV 1533D, S/N: 0192J1FN113123).

ACR used special Data Recovery techniques to retrieve/recover data from the above disk drive and was able to recover some corrupted files, and then copied to Special Data Recovery computer system. The process was repeated twice. When the files were copied, their properties were then examined for modifications (deletions) done on December 14, 2000 during the time frame of after 1:00 PM & later on the same day. (ACR found 4 corrupted files with extension *. CSW, modified (corrupted) on Dec 14, 2000 at 2:05 PM. 1 file with extension * .__MP modified (corrupted) on Dec 14, 2000 at 1:17 PM. Additional corrupted files were found on the same day. (They are on the supplied CD).

After searching through 271 MB of information that included 2,166 files, of 237 folders, the files found are located on the disk provided. The listed names or programs are files found modified on December 14, 2000. (The meaning of files found Modified is the result of a change or deletion or corruption).

Advance Computer Repair has completed its examination of the hard drive. The data recover)' was attempted at least twice, and the tiles found modified (corrupted) on December 14, 2000 are listed in the disk provided.

Advance Computer Repair wishes good luck, and hopes our analysis will be useful to your case.

Thank You

APPENDIX C-4

DENY ASI' MOTION

LOS ANGELES COUNTY SUPERIOR JUDGE

Mr. ARAGON' S OPINION

WITH RESPECT TO DEFENDANTS ACTION.

2. DENY ASI's Motion. "ASI argues that it was found to have negligently deleted Boyd's screenplays from his computer, and that a negligence action can never support a punitive damage award. The evidence, however, supports an inference that ASI technician Kassenborg was repeatedly warned by Boyd about the screenplays on the hard drive and of their value, but he nevertheless deliberately erased the screenplays from the hard drive. There was then evidence to support a finding that ASI knew of Kassenborg's intentional deletion of the hard drive and not only ratified it but "lost" Kassenborg's memo and attempted to cover up Kassenborg's error.

The jury was instructed on ratification and on "malice." The malice instruction (CACI 3944) told the jury that included "conduct [that] was despicable and was done with a willful and knowing disregard of the rights... of another." The conduct described above, in the court's opinion, falls well within that definition. Moreover, the court rejects ASI's contention that where the underlying tort is negligence, there can never be a punitive damage award. *(See, e.g., Nippon Credit v. 1333* (2001) 86 Cal.App.4th 486, an action for waste resulting in no injury and involving only economic loss where the defendant's conduct was sufficiently spiteful to warrant exemplary damages.")

APPENDIX C-5

CROSS EXAMINATION:

SBC EMPLOYEE RECEIVED $25000.

ACCORDING TO THE EXHIBIT "105" THIS

EMPLOYEE

WAS FIRED

Trial

A In the documents that I referred to earlier, there was a reference about an employee's being fired, and I did not recall that this employee had been fired. So I called Bob Casali to ask him if this person had been fired or had he been downsized when we went through a downsizing, and Bob said he would check, and he sent me an email later in the day.

Q And what did that email say?

A That he wasn't fired. That he was just -- He took an offer, a $25,000 offer, to downsize. We were trying to incent people to -- We had too many employees, and we were trying to incent them to go off the payroll without having to be, you know, let go because we had too many, and he volunteered to go.

Q And then the payment was actually for twenty-five thousand?

A I think so.

Q What is Mr. Casali's position presently with the company?

A He's President of ASI.

Q What was his position back, say, in December 2000 or the first few months of 2001?

A He was the VP Services, ASI, for West, California, Nevada.

APPENDIX C-6 (a)

DEFENDANT SBC LETTER TO BOYD'S WITNESS ASKING FOR FAVORABLE REPORT

February 6, 2001

Mr. John H. Atterbury

Memorandum regarding Ghazi Bayat Nichola

Mr. Atterbury,

I am attaching the invoices from Burgess Consulting, the firm that attempted to perform a data recovery after the alleged incident. I have left messages with Burgess to discuss adding some move favorable narrative on the invoice, but have not yet heard back from him. As soon as I speak with him I will forward any additional information that I receive. Please call if you have any questions or if I can be of any assistance. Thank you

Tim Mason
SBC Advanced Solutions Inc.
(858)496-5135

cc: K. Epstein

APPENDIX-6 (b)
CROSS EXAMINATION OF DEFENDANT SBC EXECUTIVE

Q AS BEST YOU REMEMBER, AT THE TIME WHEN HE WAS
YOU COULD READ WHAT THE BODY OF THAT MEMO SAYS, BEGINNING WITH "I AM ATTACHING."

A (READING)
I AM ATTACHING THE IVOICES FROM BURGESS CONSULTING, THE FIRM THAT ATTEMPTED TO PERFORM A DATA RECOVERY AFTER THE ALLEGED INCIDENT. I HAVE LEFT MESSAGES WITH BURGESS TO DISCUSS ADDING SOME MORE FAVORABLE NARRATIVE ON THE INVOICE BUT HAVE NOT YET HEARD BACK FROM HIM. AS SOON AS I SPEAK WITH HIM, I WILL FORWARD ANY ADDITIONAL INFORMATION THAT I RECEIVE. PLEASE CALL WITH ANY QUESTIONS OR IF I CAN BE OF ANY ASSISTANCE.
THANK YOU.

Q NOW, AT THAT POINT HAD YOU YOURSELF LEFT SOME MESSAGES WITH MR. BURGESS?

A I HAD LEFT AT LEAST ONE MESSAGE WITH BURGESS, AND I BELIEVE MR. MCGOVERN HAD, AS WELL.

Q AND THE REASON THAT YOU LEFT A MESSAGE WITH MR. BURGESS WAS AT THE SUGGESTION OF MR. MCGOVERN; IS THAT CORRECT?

A YES.

Q AND THE SUGGESTION TO YOU WAS THAT YOU SHOULD CONTACT THE TECHNICIAN AND TRY TO HAVE HIM ADD SOME INFORMATION THAT WAS MORE FAVORABLE TO SBC IN THE REPORT THAT HE DID?

A AS A RESULT OF WHAT HE HAD SPOKEN -- AS A

SENT THIS MEMO, IT DIDN'T HAVE ANYTHING ON IT AT ALL.

Q BUT YOU HAVE SINCE SEEN A COPY OF THIS MEMO WITH THIS ON IT, HAVEN'T YOU?

A YES. YES.

Q AND IS IT YOUR UNDERSTANDING THAT THIS WAS A
DOCUMENT THAT WAS IN THE SBC FILES?

A YES.

Q NOW, DID YOU IN FACT, AFTER YOU SENT THIS MEMO, YOU YOURSELF HAVE ANY FURTHER' CONTACT WITH MR. BURGESS?

A NO, SIR.

Q AND JUST FOR PURPOSES OF THE RECORD, IF YOU COULD GO THROUGH WHAT IS ATTACHED TO THIS MEMO.

THE NEXT PAGE -- YOU ENCLOSED WITH THIS MEMO INFORMATION THAT YOU HAD RECEIVED FROM MR. BURGESS; IS THAT CORRECT?

A YES.

Q AND THE NEXT PAGE IS A SHEET WHICH SETS FORTH TIME THAT WAS SPENT IN DATA RECOVERY ATTEMPTS AND LISTS WHAT THE COST OF THAT IS; IS THAT CORRECT?

A THAT'S CORRECT, YES.

THE COURT: MR. STACK, I'M SORRY. MR. STACK, THIS IS PART OF EXHIBIT 117?

MR. STACK: YES, IT IS, YOUR HONOR. THE COURT: VERY WELL.

MR. STACK: AND I'M SORRY. FOR PURPOSES OF THE RECORD, EXHIBIT 117 IS ACTUALLY A FOUR-PAGE DOCUMENT.

THE COURT: THANK YOU.
ABOUT THERE BEING ABSOLUTELY NO SEGMENTS OR FRAGMENTS OF SCRIPT ON THE HARD DRIVE.

Q DID YOU YOURSELF HAVE ANY CONVERSATION WITH THE TECHNICIAN? I'M SORRY, WITH THE RECOVERY TECHNICIAN?

A NO, SIR, NOT DIRECTLY.

Q AND SO EVEN THOUGH YOU HAD NOT HAD ANY CONVERSATIONS WITH HIM, YOU PASSED ON A MESSAGE YOURSELF ABOUT HIM ADDING SOME MORE FAVORABLE LANGUAGE?

A I PASSED ON A MESSAGE TO CALL ME BACK. I DON'T BELIEVE I EVER EVEN BROUGHT UP WHY I WAS CALLING, JUST WHO I WAS AND I WOULD LIKE TO TALK TO HIM.

Q WAS THERE MENTION IN THAT -- ANY MESSAGE THAT WAS LEFT WITH YOU OR ANY COMMENT BY MR. MCGOVERN TO YOU THAT ADDITIONAL MONEY COULD BE PAID TO MR. BURGESS FOR TAKING MORE TIME TO WRITE THAT INFORMATION OR DO FURTHER WORK?

A NOT THAT I AM AWARE OF, NO.

Q NOW, DIRECTING YOUR ATTENTION TO THE BOTTOM PORTION OF THIS MEMO, AND IT HAS IN HANDWRITING WHERE IT SAYS "NO ATTORNEY RETAINED, ALTHOUGH HE HAS CONSULTED, 91M IN POTENTIAL DAMAGES, FOUR WITNESSES, ONE COMPUTER TECHNICIAN, THREE LITIGATORS," AND THE LAST THREE -- DO YOU KNOW WHAT THAT IS AT THE BOTTOM?

A NO, SIR.

Q AND NOW, SO SOMEONE ON THIS DOCUMENT AT SBC HAD NOTED THAT THERE WAS 91 MILLION IN POTENTIAL DAMAGES?

A I DON'T KNOW WHO PUT THAT ON THERE. WHEN I

AND AS YOU LOOK AT THAT, DOES THAT LOOK FAMILIAR TO YOU?

A YES.

APPENDIX C-7
SPECIAL VERDICT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

NICHOLAS BOYD aka NIKROUZ GHAZIBAYAT Plaintiff, SPECIAL VERDICT v. PACIFIC BELL; SBC COMMUNICATIONS, INC.; SBC ADVANCED SOLUTIONS, INC.; ASI; and DOES 1 through 50, inclusive, Defendants.	)NO.BC263588

VF-401. Negligence — Single Defendant

Plaintiff's Negligence at Issue — Fault of Others Not at Issue

We answer the questions submitted to us as follows:

1. Was James Kassenborg acting within the scope of his employment with SBC Advanced Solutions Inc. (ASI) when the incident occurred?

_X_ Yes ___ No

Answer question 2.

2. Was SBC Advanced Solutions, Inc. (ASI) negligent?

_X_ Yes ___ No

If your answer to question 2 is yes, then answer question 3. If you answered no, then answer question 8.

3. Was SBC Advanced Solutions, Inc.'s (ASI) negligence a substantial factor in causing harm to Nicholas Boyd?

_X_ Yes ___ No

If your answer to question 3 is yes, then answer question 4. If you answered no, then answer question 8.

3. Did Nicholas Boyd sustain damages?

_X_ Yes ___ No

If your answer to question 4 is yes, then answer question 5. If you answered no, then answer question 8.

5. Was Nicholas Boyd negligent?

_X_ Yes ___ No

If your answer to question 5 is yes, then answer question 6. If you answered no, then answer question 8.

6. Was Nicholas Boyd's negligence a substantial factor in causing his harm?

_X_ Yes ___ No

If your answer to question 6 is yes, then answer question 7. If you answered no, then answer question 8.

7. What percentage of responsibility for Nicholas Boyd's harm do you assign to:

SBC Advanced Solutions (ASI):	45%
Nicholas Boyd:	55%
TOTAL	100%

Answer question 8.

SPECIAL *VERDICT*

VF-1900. Intentional Misrepresentation

8. Did SBC Advanced Solutions, Inc. (ASI) make a false representation of an important fact to Nicholas Boyd?

_X_ Yes ___ No

If your answer to question 8 is yes, then answer question 9. If you answered no, then answer question 13.

9. Did SBC Advanced Solutions, Inc. (ASI) know that the representation was false, or did it make the representation recklessly and without regard for its truth?

___ Yes _X_ No

If your answer to question 9 is yes, then answer question 10. If you answered no, then answer question 13.

10. Did SBC Advanced Solutions, Inc. (ASI) intend that Nicholas Boyd rely on the representation?

__ Yes ___ No

If your answer to question 10 is yes, then answer question 11. If you answered no, then answer question 13.

11. Did Nicholas Boyd reasonably rely on the representation?

__ Yes ___ No

If your answer to question 11 is yes, then answer question 12. If you answered no, then answer question 13.

12. Was Nicholas Boyd's reliance on SBC Advanced Solutions, Inc.'s (ASI) representation a substantial factor in causing harm to Nicholas Boyd?

___ Yes ___ No

Answer question 13.

3

SPECIAL VERDICT

VF-2202. Intentional Interference With Prospective Economic Relations

13. Did Nicholas Boyd and a movie producer have an economic relationship that probably would have resulted in an economic benefit to Nicholas Boyd?

_X_ Yes ___ No

If your answer to question 13 is yes, then answer question 14. If you answered no, then answer question 19.

14. Did ASI know of the relationship?

___ Yes _X_ No

If your answer to question 14 is yes, then answer question 15. If you answered no, then answer question 19.

15. Did ASI intend to disrupt the relationship?

__ Yes ___ No

If your answer to question 15 is yes, then answer question 16. If you answered no, then answer question 19.

16. Did ASI engage in wrongful conduct?

__ Yes ___ No

If your answer to question 16 is yes, then answer question 17. If you answered no, then answer question 19.

17. Was the relationship disrupted?

__ Yes ___ No

If your answer to question 17 is yes, then answer question 18. If you answered no, then answer question 19.

18. Was ASI's wrongful conduct a substantial factor in causing harm to Nicholas Boyd?

__ Yes ___ No

Answer question 19.

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SPECIAL VERDICT

VF-2202. Intentional Interference With Prospective Economic Relations

19. Did Nicholas Boyd and a movie producer have an economic relationship that probably would have resulted in an economic benefit to Nicholas Boyd?

_X_ Yes ___ No

If your answer to question 19 is yes, then answer question 20. If you answered no, then go to the instructions for question 27.

20. Did ASI know or should it have known of the relationship?

___ Yes _X_ No

If your answer to question 20 is yes, then answer question 21. If you answered no, then go to the instructions for question 27.

21. Did ASI know or should it have known that this relationship would be disrupted if it failed to act with reasonable care?

__ Yes ___ No

If your answer to question 21 is yes, then answer question 22. If you answered no, then go to the instructions for question 27.

22. Did ASI fail to act with reasonable care?

__ Yes ___ No

If your answer to question 22 is yes, then answer question 23. If you answered no, then go to the instructions for question 27.

23. Did ASI engage in wrong fill conduct?

__ Yes ___ No

If your answer to question 23 is yes, then answer question 24. If you answered no, then go to the instructions for question 27.

24. Was the relationship disrupted?

__ Yes ___ No

If your answer to question 24 is yes, then answer question 25. If you answered no, then go to the instructions for question 27.

SPECIAL VERDICT

25. Was ASI's wrongful conduct a substantial factor in causing harm to Nicholas Boyd?

__ Yes ___ No

If your answers to questions 2, 3, and 4 are yes, and/or your answers to questions 8, 9, 10, 11, and 12 are yes, and/or your answers to questions 13, 14, 15, 16, 17 and 18 are yes, and/or your answers to questions 19,20, 21, 22, 23, 24 and 25 are yes, then answer question 26.

26. What are Nicholas Boyd's total damages?

TOTAL $ 60K ($60,000)

If your answers to questions 8, 9, 10, 11 and 12 are yes and you awarded damages in question 26 and/or your answers to questions 13, 14, 15, 16, 17 and 18 are yes and you awarded damages in question 26, then answer question 27.

Punitive Damages

27. Did defendant SBC Advanced Solutions, Inc. engage in conduct with malice, oppression, or fraud?

_X_ Yes ___ No

Signed:_____
Presiding Juror

Dated: 10/13/2004
When signed, this verdict form must be delivered to the clerk.

SPECIAL VERDICT
SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

NICHOLAS BOYD aka NIKROUZ GHAZIBAYAT Plaintiff, SPECIAL VERDICT v. PACIFIC BELL; SBC COMMUNICATIONS, INC.; SBC ADVANCED SOLUTIONS, INC.; ASI; and DOES 1 through 50, inclusive, Defendants.	)NO.BC263588)))))))))))

Punitive Damages

1. What amount of punitive damages do you award plaintiff Nicholas Boyd?

$ 33,000.00

Signed: _____
Presiding Juror

Dated: Oct. 14. 2004
When signed, this verdict form must be delivered to the clerk.

APPENDIX D1

WRITER-PRODUCER NIKROUZ GHAZIBAYAT aka NICHOLAS BOYD'S CONTRACT WITH "BG PRODUCTIONS" (AVRORA FILM STUDIO).

NON-DISCLOSURE / NON-CIRCUMVENTION
AND CO-OPERATION AGREEMENT

THIS AGREEMENT IS ENTERED ON THIS _____DAY OF _____, 2000 BETWEEN:

PARTY TO 1) NICHOLAS BOYD, SCREENWRITER, PRODUCER, AND
PARTY TO 2) POTENTIAL INVESTOR, AND/OR PRODUCER IN THE STATE OF CALIFORNIA. ALL LAWS ARE ENFORCED IN CALIFORNIA, UNITED STATES OF AMERICA.

A) THE PARTY 2 AGREE ENTER S INTO AGREEMENT FOR THE PURPOSE OF SECURING 100% FINANCING AND CO-PRODUCTION AGREEMENT AND / OR PRODUCTION AGREEMENTS OF THEATRICAL, TV AND / OR HOME VIDEO FEATURE FILMS, PRODUCED AND IT IS THE PARTIES OBJECTIVE TO ARRANGE SAID AGREEMENT AND THEIR OBJECTIVE TO ACCEPT SAID FUNDS PROVIDED THEY ARE AVAILABLE UNDER CERTAIN TERMS AND CONDITIONS MUTUALLY ACCEPTED BY BOTH PARTIES.

B) BOTH PARTIES AGREE TO EQUALLY SHARE THE PROFIT GENERATED THROUGH THE SALES OF THEATRICAL, TV AND/OR HOME VIDEO FEATURE FILMS PRODUCED, UNDER A CO-PRODUCTION AGREEMENT AND / OR PRODUCTION AGREEMENT BETWEEN THE PARTIES FOR THE MENTIONED THREE PROJECTS.

C) PROFIT IS DEFINED AS:

A) 100% RECOUPMENT OF THE BUDGET, FINANCING AND / OR FINDERS FEES, IF ANY,
B) DISTRIBUTION FEES, IF ANY,
C) DISTRIBUTION EXPENSES, IF ANY,
D) INVESTORS SHARE.

NOW THEREFORE, IN CONSIDERATION OF THE MUTUAL PROMISES SET FORTH HEREIN, EACH PARTY AGREE AS FOLLOWS:

1) THE PARTY 2 HEREBY AGREE THAT HE OR HIS CORPORATION, OR ANY OF THEIR DIVISIONS, SUBSIDIARIES, AGENTS, OR CONSULTANTS WILL NOT ENTER INTO ANY BINDING CONTRACT FOR CO-PRODUCTION AGREEMENT AND / OR PRODUCTION AGREEMENT FOR THEATRICAL, TV AND / OR HOME VIDEO FEATURE FILMS, OR OTHERWISE INVOLVE IN ANY TRANSACTION WITH THE OTHER'S BANKING OR LEADING INSTITUTIONS, TRUSTS, CORPORATIONS OR INDIVIDUAL LEADERS OR BORROWERS, BUYERS OR SELLERS, EITHER SEPARATELY OR INDIVIDUALLY, AND THEIR ASSOCIATES WITHOUT ENTERING A BINDING CONTRACT WITH MR. NICHOLAS BOYD OWNER OF THREE SCREENPLAY FOR INVESTMENT PURPOSES FOR SCREENPLAYS (COLOR OF TULIP, BLOOD ON ICE, BLOOD ON SEVEN HILLS) THEIR OWN FUNDS OR THEIR INVESTORS FUNDS FOR THE PRODUCTION OF MENTIONED THREE SCREENPLAYS OF MR. NICHOLAS BOYD.

2) THE TERM OF THIS AGREEMENT SHALL BE FIVE YEARS FROM THE DATE THAT PARTY ONE AND PARTY TWO ENTER INTO CONTRACTUAL AGREEMENT OR UNTIL MUTUALLY TERMINATED IN WRITING BY BOTH PARTIES.

3) ANY CONTROVERSY OR CLAIMS ARISING FROM OR RELATING TO THIS AGREEMENT, OR BREACH THEREOF, AND WHICH IS NOT SETTLED BETWEEN THE SIGNATORIES THEMSELVES, SHALL BY ARBITRATED IN ACCORDANCE WITH THE STATUES BELOW WITH HEARINGS TO TAKE PLACE IN LOS ANGELES COUNTY OF THE STATE OF CALIFORNIA UNITED STATE OF AMERICA IN ANY COURT HAVING JURISDICTION THEREOF, INCLUDING THE AWARD TO THE AGGRIEVED SIGNATORY (SIGNATORIES), FOR THE TOTAL REMUNERATION RECEIVED AS A RESULT OF BUSINESS CONDUCTED WITH THE PARTIES COVERED BY THIS AGREEMENT, PLUS ALL COURT COSTS, ATTORNEY FEES, AND OTHER CHARGES AND DAMAGES DEEMED FAIR BY THE ARBITRATOR(S).

COLOR OF TULIP PRODUCTION "LLC"
MOTION PICTURE, TELEVISION PRODUCTION
TEL/FAX: 81&-76&-9535
EMAIL: COLOR OF TULIP PRODUCTION @JUNO. COM
5032 LANKERSHIM BLVD # 6
NORTH HOLLYWOOD, CALIFORNIA 91601

STIPULATION TO THE AGREEMENT

THE FOLLOWING IS A SUMMARY OF CERTAIN ASPECTS OF THIS MEMORANDUM, THIS SUMMARY IS QUALIFIED IN ITS ENTIRETY BY THE MORE DETAILED INFORMATION APPEARING ELSEWHERE HEREIN, AND THE DESCRIPTION OF ANY DOCUMENT IS QUALIFIED IN THE ENTIRELY BY THE TERMS OF SUCH DOCUMENT.

THE PARTNERSHIP

THE GENERAL PARTNERSHIP:

THE GENERAL PARTNER(S) OF THE PARTNERSHIP WILL BE COLOR OF TULIP PRODUCTION "LLC" LIMITED LIABILITY COMPANY.

THE PRINCIPAL OFFICE OF THE GENERAL PARTNERSHIP IS LOCATED AT: 5032 LANKERSHIM #6, N. HOLLYWOOD, CA 91601.

BUSINESS OF THE PARTNERSHIP:

THE PARTNERSHIP WILL BE FORMED FOR THE PURPOSE OF PRODUCING, OWNING, LICENSING, AND PARTICIPATING IN REVENUE FROM A FEATURE-LENGTH THEATRICAL MOTION PICTURE (THE

PICTURE) PRESENTLY ENTITLED (1) "COLOR OF TULIP"; (2) "BLOOD ON SEVEN HILLS, APRIL 24™ GENOCIDE" (3) "BLOOD ON ICE"; ONE OR ALL OF THE ABOVE TITLES.

PARTNERSHIP OBJECTIVES:

THE OBJECTIVE OF THE PARTNERSHIP IS TO PAY BACK 100% THE INVESTORS MONEY FIRST. (SEE ILLUSTRATIVE INCOME DISTRIBUTION CHART)

THE PICTURE:

THIS MOTION PICTURE PRODUCTION PACKAGE INCLUDES THREE SCREENPLAYS 'COLOR OF TULIP","BLOOD ON SEVEN HILLS, APRIL 24™ GENOCIDE," AND "BLOOD ON ICE" BY NICHOLAS BOYD. THE PICTURE WILL BE A FEATURE-LENGTH MOTION PICTURE WITH A RATING BY THE MOTION PICTURE ASSOCIATION OF AMERICA NOT MORE RESTRICTIVE THAN 'R'.

THE BUDGET:

A PRELIMINARY BUDGET HAS BEEN PREPARED FOR THESE THREE PROJECTS. THE BUDGET WHICH INCLUDES PRE-PRODUCTION AND POST-PRODUCTION COSTS, IS CURRENTLY ESTIMATED AT $9,998,412 AND COST WOULD GO UP DRASTICALLY IF A+ ACTORS AND/OR A+ DIRECTORS ARE UTILIZED.

ESSENTIALLY, THE SPIRIT OF THE AGREEMENT IS OF MUTUAL TRUST AND CONFIDENCE AND RELIANCE UPON EACH OTHER TO DO WHAT IS FAIR AND EQUITABLE FOR ALL CONCERNED AND FOR

THE WELL BEING AND SUCCESS OF FILM PROJECTS FINANCED, PRODUCED AND DISTRIBUTED WITH THE ASSISTANCE OF BOTH PARTIES.

IN WITNESS THEREOF, WE THE UNDERSIGNED AFFIX OUR SIGNATURES BELOW IN FULL UNDERSTANDING AND RECOGNITION TO THE TERMS AND CONDITIONS OF THIS AGREEMENT IN GOOD FAITH.

PARTY TO 1)

NIKRUZ GHAZIBAYAT (A.K.A. NICHOLAS BOYD)

PARTY TO 2)

APPENDIX D-2
PRODUCTION BUDGET OF WRITER-PRODUCER BOYD'S SCREEN PLAYS

PRODUCTION BUDGET

120 DAYS LOCATION:
60 DAYS TRAVEL
15 DAYS REHEARSAL

ABOVE THE LINE COSTS:	
1. STORY RIGHTS	100,000
2. SCREENPLAY & REWRITES	250,800
3. PRODUCER STAFF	550,000
4. DIRECTOR STAFF	342,875
5. CAST	3,171,500
	4,415,175
BELOW THE LINE COSTS - PRODUCTION PERIOD:	
6. EXTRAS	164,055
7. PRODUCTION STAFF	400,241
8. SET DESIGN & CONSTRUCTION	117,458
9. SET DRESSING	55,064
10. PROPS	46,989
11. CAMERA CREW & EQUIPMENT	210,655
12. SET OPERATING	124,856
13. STILLS	16,430
14. ELECTRICAL & LIGHTING	75,659
15. SOUND, PRODUCTION	61,901
16. SPECIAL EFFECTS	1,023,378
17. WARDROBE	46,475
18. MAKEUP & HAIRDRESSING	25,360
19. PUBLICITY	18,930
20. FILM & LABS, PRODUCTION	213,163
21. TRANSPORTATION	200,856
22. LOCATION	461,387
23. TEST	5,000

	3,267,857
BELOW THE LINE COSTS - EDITING PERIOD:	
24. EDITORIAL	231,623
25. MUSIC	250,000
26. TITLES & OPTICAL	100,000
27. SOUND, POST-PRODUCTION	61,781
28. FILM & LABS, POST-PRODUCTION	33,660
	677,064
BELOW THE LINE COSTS - OTHER COSTS:	
29. INSURANCE 200,000	
30 MISC., LEGAL, ACCOUNTING 150,500	
31. CONTINGENCY 8,836,090 x 10.0%	883,600
	1,234,100
TOTAL BELOW THE LINE:	5,179,021
32. FINANCE COST 9,594,196 x 2.50%	239,854
TOTAL DIRECT COST OF PRODUCTION	$9,833,050

APPENDIX D-3
APPROVAL OF WRITER-PRODUCER CONTRACT BY "BG" PRODUCTIONS REPRESENTATIVE BERLIN GERMANY

BG PRODUCTIONS
REPRESENTATIVE BERLIN

Color of Tulip Productions LLC
Attn: Nicholas G.

3 April, 2001

Dear Nicholas:

We agree to produce your project "Genocide" and provide you a contract with the terms and conditions which were presented to us by your company 3 months ago

Hope to start working with you as soon as possible.

Sincerely,

Edward Krapivsky
On behalf of BG Productions

APPENDIX D-4

LETTER TO BOYD FROM ELK ENTERTAINMENT GROUP, Inc REGARDING BOYD'S SCREENPLAYS

Subj: here ya go
Date: 2/1/2001 12:52:34 PM Pacific Standard Time
From: kale@workiofindie.com (Kale Kaposhilin)
Reply-to: kale@woridofindie.com
To: coloroftufip@aol.com

February 1. 2001

Nicholas Boyd
Color of Tulip Production LLC
5032 Lankershim Blvd. #6
North Holtywood, CA 91601

Dear Mr. Boyd:

Thank you for your interest in the Elk Entertainment Group, Inc. and Ballantine Films. Your projects reflect an excellent appreciation and understanding of the emerging interests in film today. Additionally, your budget looks quite reasonable and is within the scope of our financial ability. At ELK we are on strict time schedules however and as of yet we have not received the promised script for "Genocide". As a result we have elected to pursue a different project and distribute our resources accordingly. Please keep us in mind for future endeavors. I do hope to be able to work with you in the future.

Best Regards,

Kale Kaposhilin
Director of Operations
ELK Entertainment Group, Inc.

APPENDIX D-5
AVRORA FILM STUDIOS, DIRECTOR OF OPERATIONS TESTIMONY RE: BOYD'S FEES AS WRITER-PRODUCER.

Q AND CAN YOU DESCRIBE WHAT THAT IS, PLEASE?

A THIS IS THE BUDGET BREAKDOWN WHICH WAS SENT TO US BY MR. BOYD. IT'S BELOW-THE-LINE BUDGET FOR THE ALL THREE PROJECTS.

Q AND THE APPROXIMATE BELOW-THE-LINE TOTAL WAS WHAT?

A IT WAS APPROXIMATELY $10 MILLION.

Q AND THERE WAS INCLUDED IN THE TOTAL THERE ARE ABOVE-THE-LINE COSTS AND THEN ALSO BELOW-THE-LINE COSTS; IS THAT CORRECT?

A CORRECT.

Q AND IF I PUT UP THE FIRST PAGE OF THIS DOCUMENT THAT IS IN FRONT OF YOU.
AND THE BUDGET THAT YOUR COMPANY RECEIVED INDICATED A PROPOSAL FOR THE STORY RIGHTS OF $100,000; IS THAT CORRECT?

A YES.

Q AND IT HAD - • WHAT DID IT PROVIDE FOR THE SCREENPLAY AND REWRITES?

A AS YOU SEE, 250,000 FOR THE SCREENPLAY. AND THEN FOR THE PRODUCER'S FEE, 550,000.

Q AND THE APPROXIMATE TOTAL FOR A SINGLE PROJECT OF THE STORY RIGHTS, THE

SCREENPLAY RIGHTS AND REWRITES AND THE PRODUCTION FEE WAS $900,000; IS THAT CORRECT?

A CORRECT.

THE THING IS THAT CATCHES THE EYE, THE IDEA,
BECAUSE IF THE IDEA IS BAD, BELIEVE ME, IT DOESN'T MATTER HOW WELL IT'S GOING TO BE THE SCREENPLAY, THE FILM IS GOING TO BE BAD.

ABOUT MR. BOYD'S CASE, THE IDEA WAS ABSOLUTELY, FOR OUR POINT OF VIEW, GREAT, AND WE FELT THAT WE CAN DO A GREAT MOVIE OUT OF IT.

Q AND WHAT WAS THERE ABOUT THE IDEA THAT YOU THOUGHT •MADE YOU THINK YOU COULD MAKE A GREAT MOVIE OUT OF IT?

A WELL, FOR EXAMPLE, THE GENOCIDE STORY, IT'S AN EPIC. IT'S A TRAGIC MOMENT IN THE WORLD HISTORY ABOUT ONE PEOPLE WERE KILLING ANOTHER PEOPLE FOR NO APPARENT REASON, AND THIS WAS NOT SHOWN UNTIL NOW IN THAT TYPE OF PERSPECTIVE WHICH MR. BOYD PRESENT THIS PROJECT WAS.

Q NOW, THAT RAISES AN INTERESTING QUESTION BECAUSE YOU HAVE INDICATED THAT YOU WERE GOING TO PAY MR. BOYD SEPARATELY FOR STORY RIGHTS VERSUS SCREENPLAY WRITING FEES, RIGHT?

A WE HAD AGREED IN GENERAL TERMS THAT REGARDING

THE BUDGET WHICH HE SENT TO US. WE ALWAYS UNDER THE FIGURE OF $900,000 WHEN THE STORY IS GOING TO BE INCLUDED PRODUCER'S FEE, THE RIGHTS AND THE SCREENPLAY.

Q AND FOR THE STORY RIGHTS, YOU WERE GOING TO PAY $100,000, AND FOR THE SCREEN WRITING FEES, YOU WERE GOING TO PAY IT WAS $100,000 FOR STORY RIGHTS, RIGHT?
ARIGHT.

Q AND 250,000 FOR SCREENPLAYS AND REWRITES,

POSSIBLE."

Q NOW, THERE HAS BEEN PREVIOUSLY IDENTIFIED IN THE CASE TWO EXHIBITS, EXHIBIT 77 AND 78. FOR PURPOSES OF THE RECORD, EXHIBIT 77 WAS PREVIOUSLY IDENTIFIED AS AN AGREEMENT-TYPE OF DOCUMENT. AND THEN EXHIBIT 78 WAS A BUDGET DOCUMENT.

IF YOU TAKE A MOMENT AND TAKE A LOOK AT THOSE DOCUMENTS. MY QUESTION TO YOU IS, DO YOU RECOGNIZE THOSE AS COPIES OF CONTRACT AND BUDGET DOCUMENTS THAT WERE PREPARED IN THIS MATTER, THE BOYD PROJECT?

A AFTER SUCH A LONG TIME, WHAT I THINK THAT THAT IS WHAT I SAW AT THAT TIME, LOOKS FAMILIAR.

Q NOW, AS THE HEAD OF PRODUCTION OF AVRORA MEDIA, WAS THERE AN UNDERSTANDING OR AN AGREEMENT REACHED BETWEEN AVRORA

MEDIA AND MR. BOYD WITH REGARD TO HIS PROJECTS?

A WELL, FROM THE NUMBERS I REMEMBER, IT WAS SOMETHING WHERE, AS I SAID BEFORE, IT WAS WITHIN THE AUTHORITY OF MR. KRAPIVSKY TO OKAY IT. AND FROM OUR POINT OF VIEW, IT WAS SOMETHING VERY INTERESTING. WE SAID YES, GO AHEAD.

EVERYTHING ELSE, BASICALLY SECURING IT AND COMING TO A FINAL AGREEMENT WITH THE AUTHOR AND THE PROJECT WAS MR. KRAPIVSKY, WHO BASICALLY HAD TO CLOSE THE DEAL, BRING IT TO US, AND MR. BOOKMAN THEN HAD TO FINANCE IT AND REALIZE IT.

Q WAS IT YOUR UNDERSTANDING THAT THE UNDERSTANDING AS BETWEEN MR. KRAPIVSKY ON BEHALF OF THE

A GO IN TERMS OF WANTING TO FOLLOW THROUGH WITH RECEIPT OF THE SCRIPTS AND GET, THE PROJECTS GOING; IS THAT CORRECT?

A YES.

Q AND MR. BOOKMAN HAD ALSO BEEN KEPT IN TOUCH WITH REGARD TO THE STATUS AND HE WAS IN ACCORD WITH IT ALL; IS THAT CORRECT?

A HE WAS VERY WELL AWARE OF THE PROJECT.

APPENDIX D-6

TESTIMONY OF HEAD OF AVRORA FILM STUDIOS RE: PRODUCTION OF BOYD'S SCREENPLAYS TO MOTION PICTURES

Q NOW, YOU HAD MENTIONED THAT THE AVAILABILITY
OF MONEY THROUGH THE VARIOUS FUNDS WHICH WAS READILY ACCESSIBLE IN THIS TIME PERIOD OF 2000 INTO 2001.

WERE THERE ALSO SITUATIONS WHERE THE COMPANY ITSELF WOULD HELP CONTRIBUTE TOWARDS IN FINANCING A PROJECT?

A YES, AVRORA MEDIA WAS ALSO IN A POSITION TO INVEST ITSELF; MEANING, PUT UP SEED MONEY. LIKE "AMERICAN WEREWOLF IN PARIS," THE MONEY WAS - - THE INITIAL MONEY FOR
THE RIGHTS, THE STORY, THE PACKAGE OF 3 MILLION, AS I MENTIONED BEFORE, CAME FROM MR. BOOKMAN.

LITTLE VAMPIRE," THE RIGHTS, THE STORY, THE INITIAL PACKAGE. "9 MILES DOWN," "PNIN," ALL OF THE BASICALLY INITIAL PACKAGES WERE FINANCED THROUGH MR. BOOKMAN AND AVRORA.

Q: DID YOU AT THAT TIME AS THE HEAD OF PRODUCTION HAVE ANY CONCERN ABOUT THE AVAILABILITY OF MONEY TO FINANCE THESE PROJECTS AND PURSUING THEM FROM MR. BOYD?

A. NOT REALLY BECAUSE THIS WAS - YOU HAD MEETINGS ON A - - NOT ON A DAILY BASIS, BUT PRETTY FREQUENT MEETINGS WITH THESE FILM FUNDS THAT WERE LOOKING FOR

BEST AVAILABLE COPY

PROJECTS BECAUSE THEY COLLECTED THE MONEY BECAUSE THEY HAD TO BASICALLY PRODUCE BY THE END OF THE YEAR.
SO IT WAS A TIMELY MATTER. FOR THEM, YOU MAY HAVE HEARD THIS IS -- IT'S A TAX PROGRAM, A TAX WRITE-OFF. SO I DIDN'T REALLY SEE ANY CONCERNS.

Q AND WHAT WERE THE FEELINGS BY YOURSELF, MR. KRAPIVSKY, AND THE COMPANY AS TO FEELING WHETHER THESE STORIES COULD BE SUCCESSFUL AS A MOVIE?

A WHEN YOU PUT UP A MILLION PER PROJECT, YOU DO BELIEVE THAT IT WILL HAVE SUCCESS.

Q NOW, AT SOME POINT DID YOU LEARN THAT THERE WERE SOME DIFFICULTIES IN PROVIDING FURTHER INFORMATION BY MR. BOYD TO YOUR COMPANY?

A SAY IT AGAIN. I'M SORRY.

Q SURE.

AT SOME POINT DID YOU LEARN THAT THERE WAS
SOME DIFFICULTY ON THE PART OF MR. BOYD IN GETTING FURTHER DOCUMENTS TO THE COMPANY?

A I REMEMBER MR. KRAPIVSKY INFORMED ME THAT THERE WERE I THINK HE

CALLED IT TECHNICAL DIFFICULTIES IN RECEIVING MORE MATERIAL.

Q AND AFTER HEARING ABOUT THE TECHNICAL DIFFICULTIES, WHAT IS YOUR UNDERSTANDING AS TO WHAT HAPPENED FURTHER IN TERMS OF CONTACT WITH MR. BOYD?

A THEN, AS FAR AS I REMEMBER, MR. KRAPIVSKY KEPT IN TOUCH WITH HIM EVEN MORE, MORE FREQUENTLY, TRYING TO PUSH HIM TO GET THE MATERIAL BACK. I THINK EVENTUALLY HE MENTIONED TO ME THAT THE SCRIPTS WERE DELETED. IT DOES

APPENDIX D-7
TESTIMONY OF MISS VALDEZ
RE: EXISTENCE OF BOYD'S SCREENPLAYS
IN COMPUTER DATA BASE

A No.

Q With regards to the Mr. Krapivsky interest in the screenplays or stories that were produced by Mr. Boyd, if Mr. Boyd had screenplays and let me back up again.

I think I'm going to break down this question. Is it your understanding that at least with regard to Blood on Seven Hills and Blood on Ice, what got

A HE WAS DOING ABOUT IN -- LET ME SEE -- SINCE I MET HIM IN 1993 THROUGH 1995, TYPING THE SCRIPTS FOR "COLOR OF TULIP" AND "BLOOD ON ICE." AND THEN -- MYSELF I ALSO VOLUNTEERED TYPING SOME OF THE PAGES.

Q YOU ALSO HELPED WITH SOME OF THE TYPING?

A YES.

Q AND WHAT WERE YOU TYPING IT ON, WAS IT A TYPEWRITER OR A COMPUTER, BACK WHEN YOU WERE HELPING?

A AT THAT TIME AT THE BEGINNING IT WAS ON TYPEWRITER. NO, I'M SORRY. NO, I'M SORRY. IT WAS A COMPUTER, BUT IT HAS -- IN 1993 -- I CAN'T REMEMBER MODEL.

Q AND DO YOU KNOW WHEN MR. BOYD ACTUALLY
COMPLETED A DRAFT OF THE "COLOR OF TULIP" SCREENPLAY WHICH INCLUDED DIALOGUE AND OTHER INFORMATION? DO YOU KNOW

APPROXIMATELY WHEN HE COMPLETED A FIRST DRAFT OF THAT?

A THE "COLOR OF TULIP"?

Q "COLOR OF TULIP."

A I REMEMBER WHEN HE FINISHED?

Q YES.

A ABOUT 1995.

Q AND THE "BLOOD ON ICE" STORY THAT YOU MENTIONED, DID YOU ALSO DO SOME WORK ON TYPING SOME OF THE INFORMATION FOR "BLOOD ON ICE"?

A SOME OF IT.

Q AND DO YOU KNOW IF MR. BOYD EVER COMPLETED A DRAFT OF THE "BLOOD ON ICE" SCREENPLAY?

A YEAH, BOTH OF THEM, THE "COLOR OF TULIP" AND "BLOOD ON ICE." ABOUT BOTH OF THEM ABOUT BY 1995,
APPROXIMATELY.

Q NOW, DURING ANY OF THE TIME THAT YOU KNEW MR. BOYD, DID HE WORK ON ANY OTHER SCRIPT OTHER THAN "COLOR OF TULIP" AND "BLOOD ON ICE"?

A YES.

Q AND WHAT OTHER SCRIPT DID HE WORK ON?

A THE OTHER SCRIPT THAT HE WAS WORKING ON, IT WAS "BLOOD ON SEVEN HILLS." HE WAS LITTLE BY LITTLE STARTED WRITING AND TOOK ABOUT FOUR OR FIVE YEARS TO FINISH IT.

Q AND IN WHAT FASHION WAS HE -- OVER THAT FOUR-OR FIVE-YEAR PERIOD, CAN YOU DESCRIBE WHAT HE WAS DOING TO WORK OR WRITE ON THE "BLOOD ON SEVEN HILLS" SCREENPLAY?

A WHAT HE WAS WRITING ON?

Q OR CAN YOU DESCRIBE WHAT HE WAS DOING? WHEN YOU SAY HE WAS WRITING IT, WAS HE WRITING ON PAPER? WAS HE PUTTING INTO A COMPUTER? IF YOU COULD DESCRIBE HOW HE WAS DOCUMENTING THE WORK, "BLOOD ON SEVEN HILLS."

A FIRST HE WAS TYPING ON THE COMPUTER, AND THEN ONCE THEY WERE ALL THREE READY -- ACTUALLY, ONCE THEY WERE READY, ABOUT LIKE 1999, SOMETHING LIKE THAT, HE HAD ADVERTISED IN THE MAGAZINE "VARIETY," HE EVEN SHOWED ME THAT, AND HE GOT A RESPONSE. HE WAS SO HAPPY BECAUSE HE HAS TWO RESPONSES.

THEN AFTER THE RESPONSES, HE STARTED TO DO -- WANTED TO DO IT MORE LIKE CORRECTING IN A CORRECT WAY. WRITING IN THE CORRECT WAY.

APPENDIX D-8
TESTIMONY OF SYD FIELDS RE: BOYD'S MARKETABILITY AND REAL VALUE OF SCREENPLAYS

Q Do you recall the name or the identity of that employee that was being --

A No, sir. I don't.

So in that sense it's hard to answer that particular question that way. But a couple years ago there were that many people and more people are writing film screenplays now more than ever. Instead of the American novel it's the American screenplay, and everybody has an idea for a screenplay.

Q Is the situation different in terms of how or comparing the number of screenplays that are written versus the number that are produced?

A There are differences, yes. The whole European system is totally different from our system. Number 1, in Europe most people are the writer who writes screenplays want to be the director or the producer. In the European screenplay because so much of the money is national, that you get people writing a screenplay. They don't write the screenplay first, what they do is they write a treatment, they submit that treatment to a producer and the producer can turn around and go to the government and say "I want to do this movie."

Now, I must say it has change in the last two years since the fall of the dot com companies. Because right now, for example, in Germany whereas they were the big spenders taking any American movies and ideas and treatments and really producing them because they needed product for their market, that is no longer the case
That was made in Italy and became an international success. I think the largest or highest growing foreign language film. I was involved in a film called "Like Water for Chocolate." One of my students, Laura Esquivel, E-s-q-u-i-v-e-l, wrote

that. She wrote the novel then she adapted that to a screenplay. So I was very involved in that.

At that time in 1997 that became the highest grossing foreign film of all time. Over 20 million dollars I think it grossed. And then there are films, the Mexico film industry Alfonso Cauron, C-a-u-r-o-n. Alfonso's film, "Y Tu Mama Tambien" was and international hit that came out last year. That was even nominated for an academy award. Alfonso is now directing the third Harry Potter film.

So it depends whether it depends on whether there is a universal theme, what the acting and directing capabilities are both actors and the director, and of course the idea of the screenplay, whether it's really an idea which is universal that can attract a number of people. The human experience is so unique that no matter what culture we're in we can respond to it.

One of my students wrote a film called "Central Station" when I was in Brazil in Rio. And that was around and go to a government executive they knew and they would ask if they would be interested. We do the same thing here. They call that a "free read," you know, without coverage. So to get an idea whether or not anyone is interested in the project before that time.

Q Just so I'm clear again talking about to the European process, if someone were to sell a treatment to a European producer, would that producer need an actual screenplay to go to and get financing or would they get financing just based on the treatment?

A It depends on the circumstance, of course, if someone is known or not known. Normally it would be a treatment that would gather the interest, and if they have a

screenplay they would next be required to submit that screenplay. If they like that screenplay they would make an assumption that they would go ahead with the project or there would be interest in the project.

Q When someone submits a treatment, do they typically already have the screenplay written and they're just using the treatment to see if there's interest or is it that you write a treatment and then if there's interest you go back and write the screenplay?

A Sometimes. Yes to both. It depends. I hate to be vague.

prior to December 14 of the year 2000 Mr. Boyd had completed a screenplay for the Armenian Genocide story or "Blood on Seven Hills" as it's sometimes called?

Q Is that one of the things supposedly erased from the computer?

A Yes.

Q Did Mr. Boyd or Mr. Stack ever tell you that there was a completed screenplay for the property called "Blood on Ice" which is the Mussolini project?

A I had heard that there was a screenplay on that.

Q Who did you hear that from?

A I think Nicholas.

Q And was that screenplay and did Mr. Boyd tell you that that screenplay was erased in September of 2000?

A I believe so.

Q Now, did either Mr. Boyd or Mr. Stack tell you that a gentleman in Germany, a Mr. Krapivsky, K-r-a-p-i-v-s-k-y, expressed an interest in all three of Mr. Boyd's screenplays? And when I say all three, because I know there's other ones floating around, I'm referring to Color of Tulip, Blood on Seven Hills or the Armenian Genocide or Blood on Ice. Did either Mr. Stack

respond to that totally. My ex-boss I should say.

Q It lists here, it says "Need financing for." It lists "Project 1, Color of Tulip, action adventure" then "Project 2, Blood on Ice, World War 2 movie. War, romance, rescue mission, true story, never done before."

Is there anything significant about the fact that it lists that it's never been done before?

A Oh, yes.

Q And why is that significant?

A It makes it unique and original, and therefore, would have possibly a great appeal to someone.

Q And then it says "Project 3, Blood on Seven Hills, April 24 Genocide story in Byzantine. Romance, intrigue, Genocide, true story."

Is it your understanding that Blood on Seven Hills is about the Turkish Genocide of the Armenian population

A Yes.

Q -- in early 20th century?

A Yes.

Q Underneath it near the ad "never been done before." Is it true that's it' never been done before?

A There's been different versions of that. It's like World War II Schindler's List had never been done before, or the Tom Hanks film?

Does pre production, is that a term of art in the entertainment industry?

A Yes.

Q What does that mean?

A It means that a film is ready to go into production, that you have a screenplay done; there's been a budget done and maybe cast and crew have been hired.

Q And did you have any understanding from either Mr. Stack or Mr. Boyd or any other source that Blood on Ice, which is listed as being in pre production or Blood on Seven Hills, which is also listed as being in pre production, had they ever reached the stage of pre production that you just described; namely, having a budget done, having a cast selected, having all the, I guess pre filming work done, would that be a way to describe it?

A Yeah. It would be pre production, basically. So no, they did not say anything. I just saw the budget from the treatments I read that I was given.

Q Let's mark as Exhibit 3.

(Defendant's Exhibit 3 was marked for identification by the Certified Shorthand Reporter and is attached, hereto. By Davis, defendant's attorney:

any material before, never sold a treatment, never sold a story, anything, he was in my thinking an aspiring screenwriter, would someone who had not had a history of having sold anything or having anything produced be more or less likely to get the minimums that you just talked about?

A I mean, again, it's an individual negotiation on each one. This to me is not really excessive. It would be 350 thousand, 800 for story rights and screenplay and rewrites. That's not really excessive 'in the European market. At that time it may be a little standard, maybe a little bit high, but that always is a negotiable point. Anything you get, as my boss would say, 15 percent excess. There would be that line of negotiation with that.

Q The movies that were being produced in Germany in about the years 2000, 2001, did they tend to have budgets under five million or over five million?

A Most would be under five million at that period of time.

Q Now, the third category, again, above the line cost subset is "producer staff." And it says "$550,000" And there Boyd has claimed that he had intended to be producer of his movies and realize this fee to himself. Again, back in Europe in the year 2000, 2001, would it
correspondence, did you have a belief as to whether or not there was any interest in the other two projects that Mr. Boyd had presented which was Color of Tulip or
Blood on Ice?

A Only from that one correspondence from Mr. Krapivsky. Did I say it right?

Q I think so. And in that is that the one where he lists that he's primarily interested in the Genocide project, but then he also prioritizes the other two; correct?

A Yes.

Q Would that be unusual back in again the year 2000, 2001 for someone like Mr. Krapivsky to say this is what we're really interested in and after that this one and after that this one and after that this one. Would that be typical of someone who submitted multiple projects?

A Absolutely.

Q. And why is that?

A Just order of preference or marketability or financing or tax shelter or whatever funds he has available.

Q Now, if someone got that e-mail from Mr. Krapivsky, would you assume that their first order of business then would be actually writing the

Q Have Mr. Boyd or Mr. Stack ever told you what the story outline is for Blood on Ice?

A No.

Q I'm going to represent to you the story on Blood on Ice is apparently that Mussolini was captured during World War II, and this is a true story according to Mr. Boyd, and that he was rescued by the Nazis from his imprisonment.

Would a story like that where the Nazis were rescuing Mussolini, would that be the kind of story anyone in America would be interested in producing?

A That I don't know.

Q Do you think that that might present an issue for a German production company having a story line where the Nazis, for lack of a better term, come out as the heroes rescuing somebody?

A I don't know. It would certainly, I think it would be attractive to them, but, you know, the way the consciousness is now I don't really know. I do know that, just as another example, Frank Pearson, the former president of the Writer's Guild of America, did a film on Hitler's -- the attempt on Hitler's life with, I want to say Ema Thompson's former husband, Kenneth Branau and that was basically shot in Germany. We flew over we.happened to be on the same plane to Berlin. He
incomplete hypothetical. Not accurate based on the facts that just a portion of material of a particular screenplay was lost, but if you understand go ahead.

THE WITNESS: To me it would be very difficult to do that. And the fact that someone was interested, yes, would encourage me on. But there would be a sense of loss and of despair when I sat down in the beginning to do that. It's just that you spend so much time and effort at work in writing something and suddenly have it lost and you have to start all over again from scratch. It's like a house being burned down. Like we had the fires and people walking back into the ruins of what once was their house, must be devastating.

BY MS. DAVIS:

Q Did you have any discussions with Mr. Boyd specifically about his methodology for writing screenplays, the process that he used?